No. 379

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JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter of the Application of the United States for an Order Compelling

EARL J. CARROLL

to comply with an Internal Revenue summons.

EARL J. CARROLL,

Appellant,

INTERNAL REVENUE SERVICE,

Appellee.

(M18-304)

APPENDIX TO APPELLANT'S BRIEF

On Appeal from the United States District Court for the Southern District of New York

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In the Matter of the Application of the United States for an Order Compelling

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to comply with an Internal Revenue summons.

EARL J. CARROLL,
Appellant,

INTERNAL REVENUE SERVICE,
Appellee.

(M18-304)

Extract of Docket Entries.

Aug. 23-56	Filed order that Earl J. Carroll appear before Int. Rev. Service, Palmieri, J.
Aug. 29-56	Filed copy of order for Earl J. Carroll to appear for questions by Int. Rev. with affdvt. of service.
Oct. 15-56	Filed affdvt & notice of motion to vacate order of 8-22-56 re: Earl J. Carroll, etc. ret. 10-16-56.
Oct. 15-56	Filed affdvt of B. V. Roberts re Earl J. Carroll.
Jan. 3-57	Filed Reply affidvt re Motion to Vacate as to Earl J. Carroll.
Jan. 3-57	Filed Opinion #23,149. Motion to vacate order directing Earl J. Carroll to obey Int. Rev. summons denied. Edelstein, J. Mailed notice of entry 1-3-57.
Jan. -57	Filed Notice of Appeal.

Order Directing That Earl J. Carroll Appear Before Internal Revenue Service.

(1) Upon the affidavit of BERNARD V. ROBERTS, sworn to on August 21, 1956, and upon the affidavit of FOSTER BAM, Assistant United States Attorney for the Southern District of New York, sworn to on August 22nd, 1956, it is

ORDERED that respondent EARL J. CARROLL appear at Room 1009, 90 Church Street, New York, New York, between the hours of 10:30 and 11:00 A. M. on August 28, 1956 and answer all questions asked of him pursuant to an Internal Revenue Service summons served upon him on December 6, 1955 concerning:

(1) the contractual and financial terms and arrangements between respondent and Alfried Krupp von Bohlen and Halback during the years 1944 to 1954 inclusive;

(2) the contractual and financial terms and arrangements between respondent and Frederick Flick during the years 1944 to 1954 inclusive;

(3) all sums of money received, as legal fees or otherwise, and disbursed in the Krupp and Flick matters, and in relation to courts martial or other activities engaged in by respondent in Germany or other foreign countries during the years 1944 to 1954 inclusive, and it is further

(2) ORDERED that respondent produce all books, records, cancelled checks, memoranda and papers of whatsoever kind or nature pertaining to income or monies received, accrued or credited to his account during the years 1944 to 1954 inclusive, and it is further

ORDERED that service of this order by an officer of the Internal Revenue Service on respondent on or before August 27, 1956 shall be deemed good and sufficient service.

Dated: New York, N. Y., August 22, 1956.

EDMUND L. PALMIERI,
U. S. D. J.

Affidavit of Foster Bam, in Support of Motion for an Order Directing Earl J. Carroll to Appear Before Internal Revenue Service.

(3)

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

FOSTER BAM, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, and am familiar with this matter.

2. The United States Attorney has been requested by the Treasury Department to apply to this Court for an order directing the respondent EARL J. CARROLL to comply with a summons as appears more fully from the affidavit of BERNARD V. ROBERTS.

3. I am informed by Mr. Roberts that the respondent is presently in Miami, Florida, and that he will not return to New York until Sunday, August 26, 1956.

4. I am informed by Mr. Roberts that the respondent appeared and gave some testimony in response to an Internal Revenue Service summons; that the examination was adjourned, and that respondent has agreed to submit to a continuation of the examination on Monday, August 27, 1956.

5. I am further informed, however, that respondent refused to produce certain documents and to answer certain questions at his prior examination, and that (4) respondent's prior actions and his statements to Internal

Revenue Service officials, and the statements of his attorney, indicate that he will again refuse to answer the questions and to produce the books and records as required by the summons, and as more fully appears in the affidavit of Mr. Roberts.

6. Mr. Roberts had advised me that if, on the resumption of the examination, the respondent again refuses to testify and to produce the books and records called for by the summons, he wishes to serve an order of this Court issued pursuant to Section 7604 of Title 26, U.S.C. upon respondent requiring him to comply with the summons.

7. An ex parte order is requested since I am informed that respondent has no permanent residence and moves about a great deal, and that he is likely to leave the jurisdiction after the examination on August 27, 1956, and since he will not be available for service until August 27, 1956.

8. No prior application has been made for this relief.

WHEREFORE, it is respectfully requested that this Court issue an ex parte order requiring respondent to appear on Tuesday, August 28, to comply with the summons.

FOSTER BAM
Foster Bam
Assistant United States Attorney

(Sworn to by Foster Bam, Assistant United States Attorney, on August 22, 1956.)

Affidavit of Bernard V. Roberts, in Support of Motion for an Order Directing Earl J. Carroll to Appear Before Internal Revenue Service.

(5)

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

BERNARD V. ROBERTS, being duly sworn, deposes and says:

1. I am the Coordinator of Special Investigations, International Operations Division, Internal Revenue Service, United States Treasury Department, Washington, D. C.

2. This affidavit is made in support of an ex parte order compelling the respondent, EARL J. CARROLL, to appear before me, or other appropriate agent of the Internal Revenue Service, and answer questions and produce books and records regarding the tax liability of EARL J. CARROLL.

3. Upon information and belief the respondent, EARL J. CARROLL, was subpoenaed to appear before an officer of the Internal Revenue Service in Room 317, Plaza Building, Miami, Florida, on December 29, 1955, at 10:00 A.M., in the forenoon, pursuant to Section 7602, Title 26, U. S. Code; that the said subpoena was duly served upon the respondent; that the respondent has since been granted several extensions of the appearance date at his own request, to procure the necessary records and other reasons; that the respondent duly appeared, at his request, at 745 Fifth Avenue, New York, New York at 10:00 A.M., in the forenoon of August 16, 1956. (A photostat of the original subpoena mentioned is attached to this affidavit as Exhibit A.)

(6) 4. The respondent answered all questions asked of him with the exception of those relating to the following:

(a) The contractual and financial terms between EARL J. CARROLL and Alfried Krupp von Bohlen and Halback during the years 1944 and 1954.

(b) The contractual and financial terms between EARL J. CARROLL and Frederick Flick during the years 1944 and 1954.

(c) Any and all information concerning other income earned in Germany or other foreign countries during the years 1944 to 1954, inclusive.

(Excerpts of the pertinent testimony given by the respondent on August 16, 1956 in support of this affidavit are attached hereto as Exhibit B of this affidavit.)

5. The respondent failed to produce for examination the books, records and papers pursuant to the subpoena described in part 3 of this affidavit.

6. The respondent declined to answer questions relating to the above-mentioned matters on the ground that the Government is compelled to prove the respondent was not a bona fide resident of Germany, as covered by Section 116(a) of the 1939 Internal Revenue Code, or Section 911(a)(1) of the 1954 Internal Revenue Code, before the respondent is obligated to answer questions concerning income earned outside the United States.

7. The respondent declined to produce his books and records on the ground that the Government is compelled to prove the respondent was not a bona fide resident of Germany, as covered by Section 116(a) of the 1939 In-

ternal Revenue Code, or Section 911(a)(1) of the 1954 Internal Revenue Code, before the respondent is obligated to produce his books and records as recited in the subpoena described in part 3 of this affidavit.

8. I have, therefore, requested the United States Attorney to obtain an order from the court pursuant to Section 7604(a) and (b), Title 26, U. S. Code, directing EARL J. CARROLL to appear before a duly (7) authorized officer of the Internal Revenue Service on August 28, 1956, in Room 1009, 90 Church Street, New York, N. Y. and answer questions relating to the above-mentioned matters and to produce the above-mentioned books and records.

9. The reason why the relief sought here is by ex parte order as authorized by Section 7604(a) and (b), Title 26, U. S. Code, is that EARL J. CARROLL, is a member of the bar of the State of California who has placed the burden of proof as to residency on the Government as the ground for his refusal to answer or to produce his records for examination.

10. As Section 116(a), Internal Revenue Code of 1939 and corresponding provisions of the Internal Revenue Code of 1954, provides:

"BONA FIDE RESIDENT OF A FOREIGN COUNTRY—In the case of an individual citizen of the United States, *who establishes to the satisfaction of the Secretary or his delegate that he has been a bona fide resident of a foreign country or countries* for an uninterrupted period which includes an entire taxable year * * *" (italics supplied) it is clearly evident that the burden of proof is on the respondent to establish his claim of bona fide residency.

11. The Internal Revenue Service is presently in the midst of administrative proceedings with respect to the respondent, EARL J. CARROLL, and has every reason to believe the respondent may shortly leave the United States and the jurisdiction of the Internal Revenue Service for some time to come.

12. No previous application has been made for the relief sought herein.

Wherefore, it is respectfully requested that the respondent, EARL J. CARROLL, be issued an ex parte order directing him to answer the questions and to produce the books and records enumerated above.

(Sworn to by Bernard V. Roberts on August 21, 1956.)

Exhibit A, Annexed to Affidavit of Bernard V. Roberts.

(8)

Form. 2039

May 1955

U. S. Treasury Department—Internal Revenue Service

Summons

In the matter of the tax liability of

Earl J. Carroll

Internal Revenue District of San Francisco, California

Period(s) 1944 to 1954, Inclusive

The Commissioner of Internal Revenue

To: Earl J. Carroll

At: Fontainebleau Hotel, Miami Beach, Florida

Greeting:

You are hereby summoned and required to appear before L. Harold Moss, an officer of the Internal Revenue Service, to give testimony relating to the tax liability and/or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the time and place hereinafter set forth: All books, records, cancelled checks, memoranda and papers of whatsoever kind or nature pertaining to income or monies received, accrued or credited to your account during

Exhibit A, Annexed to Affidavit of Bernard V. Roberts.

the years shown above; including specifically the following:

(1) Information relating to amounts received and disbursed in the Krupp and Flick matters;

(2) Information relating to court martial and all other fees received by you during the years shown; and,

(3) The dates on which you arrived in and departed from the United States (and foreign countries) for the years shown.

Place and time for appearance:

At Room 317, Plaza Building, Miami, Fla., 29th on the 29th day of Dec., 1955, at 10:00 o'clock A. M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissionr to enforce obedience to the requirements of this summons and to punish default or disobedience.

Issued under authority of Section 7602, Internal Revenue Code of 1954 this 6th day of December, 1955.

call

Room 3517

Internal Revenue Service

Sterling 3-8400

Home: Ra 3-0931

ORIGINAL

Signature: GILBERT F. HALSEY
Special Agent

Exhibit A, Annexed to Affidavit of Bernard V. Roberts.

(9) CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7603, Internal Revenue Code of 1954)

I hereby certify that I served the summons on the reverse hereof.

Date summons served (Day, month, year)

Dec. 6, 1955

Time 6:55 P. M.

HOW SUMMONS WAS SERVED (Check one)

☒ I handed an attested copy thereof to the person to whom it was directed.

☐ I left an attested copy thereof with the following person at the last and usual place of abode of the person to whom it is directed.

Signature GILBERT F. HALEY

Title Special Agent

Sec. 7603. Service of Summons.—A summons issued under section 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

Form 2039 (5-55)

Exhibit B, Annexed to Affidavit of Bernard V. Roberts.

(10)

EXTRACTS FROM THE TESTIMONY OF MR. EARL J. CARROLL, DATED AUGUST 16, 1956, ACCOMPANIED BY MR. JOSEPH S. ROBINSON AS ATTORNEY, IN ANSWER TO SUMMONS SERVED DECEMBER 6, 1955.

Q. Have you filed income tax returns in any other Country other than the United States?

By Attorney: I object to that—it is immaterial.

Q. Do you know Alfred Krupp Von— A. Yes.
Q. When did you meet him?

* * *

Q. Have you performed services for Alfred Krupp? A. Yes.
Q. The nature of the services? A. Legal services.
Q. Did you have a contract with Alfred Krupp for these legal services? A. Yes.

* * *

Q. Could you give me the terms of the contract?

By Attorney: I object to that. It was amended several times.

Q. Can you tell me what did he want you to do?

By Attorney: I object to that. It called for legal services for which he paid a fee. Unless that fee is taxable he has nothing to do with the examination. The question was—is that (11) income taxable. I will state for the record if you find that the in-

come is taxable, we will pay it. Nobody is trying to prevent the United States from taking any taxes due it, but no law says that you must pay taxes—if taxes you do not owe the Government.

Q. I am trying to assemble the facts so that I can make a reasonable conclusion as to whether the income he made over there is taxable.

By Attorney: I think the major question is was he a bona fide resident outside of the United States for the period in question. The question is whether he is a bona fide resident. If you confine your questions to that I will not have any objection.

Q. I have to determine how much money is involved.

By Attorney: I do not think that is an issue now.

Q. I do not know whether he earned the money in Germany or the United States.

By Witness: All of the services which I performed were performed in Europe.

Q. Could you tell me how much you received from Krupp?

By Attorney: I object—it is immaterial, irrelevant—the question is—is he taxable for the income received while he was a resident overseas and I have that on authority from several very important tax lawyers—their advice was that information did not have to be disclosed. You are putting the cart before the horse. I object to him answering the question as to how much he received. I assume you know it.

Exhibit B, Annexed to Affidavit of Bernard V. Roberts.

Q. What is your objection.

By Attorney: You already have the information. There is no purpose in the question.

(12) Q. We are making a record of this and he wants to state for the record the amount he received for this—

By Attorney: He may want to state it himself, but I am his attorney and I object to the question. That advice is not only based on my opinion, but also advice and information that was given to me by several leading tax lawyers.

Q. Where was this fee paid to you?

By Attorney: I object to that except he may state the fact it was not paid in the United States.

By Witness: It was paid in Europe.

Q. You object to a question that this is a criminal action—that he has something to hide. I am not approaching it from that angle. I am sure he wants to cooperate with me.

By Witness: Let us put it this way and we may clear it up. All money paid to me for professional services were paid to me outside of the United States, but the place of payment would make no difference as I understand it. If I received payment in New York City from foreign sources my understanding is as I have been advised the place of payment would be immaterial, so I do not see that it makes any difference. For your information all monies received by me were received over-seas with the exception of this—the forwarding, I believe, on two occasions of the expense money to come to Eu-

Exhibit B, Annexed to Affidavit of Bernard V. Roberts.

rope in connection with two cases—nothing to do with Mr. Krupp.

(13) Q. May I ask you this—could you give me details when the fee you received from Krupp was paid to you—the years?

By Attorney: I object to that.

Q. The years you received the income which you excluded from your income tax return. A. I do not know. I should not answer that question. All of the money which I received for professional services which are not reported on the tax returns were received during the time in which I was a resident out of the United States, 1947 and in 1949, and 1950, and 1951 up to the present time. None received in the United States with the exception of those two advance payments for expenses for me to come over.

Q. Did you receive this fee in a lump sum for your services over this period of years? The Krupp fee.

By Attorney: I object to that. Lump or part payment has nothing to do with it. He received it in the period in question that is all.

Q. I think it is important for us to know how and when he received the money in order for us to make an accurate determination of whether he is properly excluding it. If he does not want to tell how much—we are entitled to know. A. I received money in installments—it involved different matters.

Q. You received it all in one year or two years? What objection would you have to tell the years? A. I did not receive it all in one year.

(14) Q. All in two years? A. I would say my answer to that is that I received some money in 1947. I received

some money in—I think probably—you are referring to the Krupp matter?

Q. Yes the Krupp matter. A. I would say the years 1947—1950, 1951 and 1952. I do not recall whether 1953, whether it was involved.

Q. Your services to Krupp extended over the period that you just mentioned 1947 to about— A. To about 1953.

By Attorney: No actually they still continue.

By Witness: No I am finished on this matter. I finished my work with Krupp early in 1955 although I am required to clean up small things that may come up from time to time based on the services rendered.

Q. Were you associated with Mr. Robinson in this so-called Krupp case? A. Yes I was.

Q. Was this association with Mr. Robinson—was that in the form of partnership or could you define what the association was? A. No I would not say a partnership. A legal association like you had with any other lawyer.

Q. Would you consider Mr. Robinson to be an employee? A. No, no, it is a legal—let me finish the answer on that other question, which I think would answer it. A lawyer association that you have with any other lawyer who is not a member of your firm with whom you consult and advise, each attempting (15) each acting independent of the other and giving independent advice, sometime it coincided and sometimes it did not. Mr. Robinson's function was to give advice on his account.

Q. Insofar as the Flick case is concerned what period of time did that occur—about the same time as covered by the Krupp? A. I think it ended a few months before Krupp.

Q. In 1947 through 1952? A. I would say until, I think about 1952—is that correct Joe?

Exhibit B, Annexed to Affidavit of Bernard V. Roberts.

By Attorney: Substantially it ran from 1947—I am talking for him. For him it ran substantially from 1947—either 1952 or 1953—late 1952.

By Witness: I will adopt that as my answer.

Q. What was the division of this fee that you received from Krupp between you and Mr. Robinson?

By Attorney: I object to that, it s immaterial.

Q. Was it on a percent—fifty fifty basis or forty sixty?

By Attorney: I object to that—it has nothing to do with the issue as to whether or not he is taxable and I object to that.

Q. Our purpose here is to try to arrive at the facts and that (16) would be one of the facts.

By Attorney: There are a lot of facts that may be interesting, but have nothing to do with whether or not Mr. Carroll is taxable for those years for that income. It may be interesting to know what he had for breakfast or what salary he paid his secretary, does he drive an automobile and it has nothing to do with the issue—whether one thousand or the lump sum—it is not a issue.

Q. When you speak about the tax liability you deal with figures.

By Attorney: Taxable income, yes. I do not have to tell you what I give my wife every week.

Q. That is not a deductible item on a tax return.

By Attorney: And this is not a taxable item, that is the point.

Exhibit B, Annexed to Affidavit of Bernard V. Roberts.

Q. This inquiry is for the purpose of determining whether he was correct in his decision to exclude the income.

By Attorney: Whether he received one hundred and four—

(17) Q. What is the difference—if we determine if he is correct and we have all the facts and figures.

By Attorney: That is not the question.

Q. In order to arrive at the decision we have to have the facts.

By Attorney: I do not see how—

Q. He would be entitled to exclude that portion he paid you from whatever he was paid. That is the reason it is important.

By Attorney: Only if he is taxable.

Q. We do not know at this point whether he is taxable or not.

By Attorney: The issue that exists is not presently before us. Whether he received five dollars or one hundred dollars. The issue is was he a bona fide foreign resident within the several statutes that are applicable to this case. Whether he received one dollar or one hundred dollars is not material at this time.

Q. The Code does not say that the income is excluded (116) that he has a right to learn how much money was excluded.

By Attorney: Does not say "he has" the right.

Exhibit B, Annexed to Affidavit of Bernard V. Roberts.

(18) Q. As to whether the determination is proper.

By Attorney: All I can say I am acting on my judgment what the law is and advice given me by several of the leading tax lawyers in the United States.

Q. Do you have any objection Mr. Carroll as to how much you paid Mr. Robinson out of the Krupp money you received? A. My situation is this—this is a matter of income tax laws. I am not a specialist, so I have asked Mr. Robinson to not only give me his own opinion, but to seek the opinion of competent tax experts. It would be foolish for me to pay for expert opinion and not follow that. The advice I have received is that income from professional services earned over-seas during the time I am a bona fide resident is not taxable and that is the advice given to me and that is the advice that I naturally follow.

Q. You are speaking of personal advice—how about the advice of— A. That has always been the advice I have received. I knew this matter was coming up and I wanted to get the advice checked by competent experts and it has been checked and my advice is as I just stated. That is not reportable income. If it is not reportable income then I do not want to get into a question of a statement as to what this income was and when it was received and how it was dispersed. If it is taxable I will have to have an accountant. The issue now—the question is whether or not I am a bona fide resident, who is excluded from reporting this income. If this is the issue I would like to state that at this time I do not want to give you an off the cuff answer. I might say what monies I received during this period of time and how they were dispersed I could not do that from memory with no records to go by.

Q. You do have records? A. I have some records.

* * *

Exhibit B, Annexed to Affidavit of Bernard V. Roberts.

(19) Q. I believe you stated previously that you did not report any of this Krupp fees on a German tax return?

By Attorney: I have objection to that and he did not answer.

Q. Do you want to answer that question as to whether you reported any of the fees from the Flick or Krupp cases?

By Attorney: I object to that.

Witness: I am following my counsel's advice.

Q. Have you paid any income to the United States or any other Country on the fees you received?

By Attorney: I object, it is immaterial and irrelevant.

Q. Would it be possible for you to assemble your records--

• • •

By Attorney: I object to the examination. The question is was he a bona fide resident. I cannot repeat that too often. That was the advice given to me by tax lawyers. I am not a tax lawyer. The tax lawyers have advised that the Government is not entitled to that information. You would not expect me to pay for advice and obtain it and then do contrary. Neither (20) would you expect Mr. Carroll. If the income is taxable we will move into the next phase. Therefore I object to that.

Q. In the event that the Commissioner were to determine this excluded income we are discussing is not excludable would you then be willing to pay any deficiency that the Commissioner determines?

Exhibit B, Annexed to Affidavit of Bernard V. Roberts.

By Attorney: You do not have to answer that. That is why we have avoided this amount. If the Commissioner makes a deal there are other places to which we may revert for redress. If we are so advised at that time.

Q. Did you have a contract with Flick for legal services that you performed? A. Yes.

• • •

Q. Do you know the general terms of the contract? A. Yes.

By Attorney: It is to pay for legal services and I object—it has nothing to do with the question whether he was a bona fide resident.

Q. Where was the Flick fee paid you? A. Outside of the United States.

Q. When was the Flick fee paid to you? A. Well it was paid during the period of 1950 I believe—1951 and possibly 1952.

Q. That covered the services that you performed over what period of time? A. All the services during the same period of time.

(21) (Testimony before not related to fees of Flick or Krupp)

Q. You stated before, I believe, Mr. Carroll, that you had a contract with a Mr. Flick of Germany? A. Yes.

Q. Do you recall approximately the date of that contract? A. No I do not.

Q. Do you recall the year even? A. No. There were several changes in it.—

• • •

Q. How was the Flick fee paid to you? By that I mean by currency of stock or any other thing of value?

By Attorney: I object to that. I do not see what that has to do whether he was a bona fide resident. Suppose he gave real estate or a pair of shoes. He said he was paid in Europe.

Q. It would have a material effect. If he were paid in real estate such as you suggest the real estate may have increased in value between the time he obtained it and sold it. There may have been a capital gain.

By Attorney: That is not what happened.

Q. We have a right to inquire as to what form the payment from Mr. Flick or Mr. Krupp—how it occurred. In what form. A. May I answer it?

By Attorney: You may answer that without giving any specific figure.

(22) A. Flick owed us a fee—and the amount of the fee was finally settled. He was unable to make the payment to us because of certain currency restrictions they had so he deposited in my name in a blocked bank of Deutschland—a certain number of shares—at the time it would be like a portion of the fee, which was not the full portion. It had to be placed in this account for one year. He deposited the shares and at the end of the year the stock was sold and it was short of the amount we agreed upon. It was within a reasonable range of the amount and we accepted it.

Q. Give me the name of the company and the name of the stock? A. I do not know the name. It was put in a blocked account—

Notice of Motion to Vacate Ex Parte Order, etc.

(46) PLEASE TAKE NOTICE that upon the ex parte Order entered herein on August 22, 1956, directing respondent EARL J. CARROLL to answer certain questions and to produce certain records pursuant to an Internal Revenue Service summons and the affidavits and exhibits in support of said ex parte order, and upon the affidavit of EARL J. CARROLL, sworn to the 4th day of October, 1956 and exhibits thereto attached, the affidavit of DONALD DOANE, sworn to the 26th day of September, 1956, the affidavit of MICHAEL ROTHKRUG, sworn to the 28th day of September, 1956, the affidavit of GERTRAUD KUNZ, sworn to the 25th day of September, 1956, the affidavit of ARTHUR FREEDMAN, sworn to the 24th day of August, 1956, and upon all the proceedings heretofore had herein, a Motion will be made at the stated term for motions in this Court at the United States Courthouse for the Southern District of New York, at the United States Courthouse, Foley Square, Room 506, on October 16, 1956 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for an order:

(a) vacating the ex parte Order entered herein on August 22, 1956;

(b) vacating and quashing the summons dated December 6, 1955 issued by the Internal Revenue Service; and

(47) (c) granting respondent such other and further relief, including a judicial hearing, as to the Court may seem proper.

NOTICE is hereby given that any affidavits, or other documents to be used in opposition to this motion shall be served on respondent's attorneys not less than five days before the return day of this motion.

HODGES, REAVIS, MCGRATH, PANTALEONI & DOWNEY

By MARTIN D. JACOBS
A Member of Firm,
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Affidavit of Earl J. Carroll, in Support of Motion to Vacate Ex Parte Order, etc.

(48)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

1. EARL J. CARROLL, being duly sworn, deposes and says: I am the individual against whom this proceeding has been instituted. I am an attorney at law having been duly admitted to practice in the State of California. I was also admitted to practice before the U. S. Courts of the Allied High Commission which functioned in Germany during part of the post-war period.

2. The Government has heretofore obtained an ex parte order on August 22, 1955 requiring me to testify at hearing before an Internal Revenue Agent as to the contractual and financial terms and arrangements between myself and certain individuals in Germany, to whom I rendered legal services during the period 1944 to 1954 and the sums of money received by me for such services, in relation to activities engaged in by me in Germany or other foreign countries during said period. The ex parte order also requires me to produce records and papers of whatsoever kind and nature pertaining to income or moneys received during said period, from foreign sources.

3. During the period of nine years from November 1946 until March 1955 I was engaged, as a resident of Germany, in the civilian practice of international law in that country and (49) received fees for such services. During 1944 and 1945 I was not a resident of Germany engaged there in the practice of law and I did not receive any fees for professional services rendered there. At all times from 1944 to 1954 I filed income tax returns as a citizen of the United States reporting all includible income but for the period

from 1946 to 1955, when I was a resident of Germany, I did not report any income received from German sources since under a statutory mandate (Section 116(a) of the 1939 Internal Revenue Code and Section 911(a)(1) of the 1954 Internal Revenue Code) income received by a bona fide foreign resident "shall not be included in gross income and shall be exempt from taxation".

4. The inquisitorial ex parte order obtained by the Government is a step in a shocking campaign to oppress me and violate my constitutional rights by inquiring into the details of income earned by me while a resident of Germany during a long period of time, income which under a statutory mandate is not reportable or taxable. I am mindful of the nature of the assertion which I here make, but the facts and circumstances hereinafter set forth will demonstrate the truth of this assertion.

BASIS OF EX PARTE ORDER

5. The ex parte order was obtained upon the basis of an affidavit of an Agent of the Internal Revenue Service which does not attach the entire record at the hearing before the Agent which is essential to an understanding of the questions presented and the position taken by me. The affidavit merely quotes certain fragmentary and distorted excerpts of the testimony which I gave, some of which excerpts, read in themselves, being misleading. It erroneously states that I declined to answer questions and produce records on the ground that the Government was "compelled to prove the respondent was not a bona fide resident of Germany, as covered by Section 116(a) of the 1939 Internal Revenue Code, and Section 911(a)(1) of the 1954 Internal Revenue Code, before the respondent (50) is obligated to answer questions concerning income earned

outside of the United States". My position at the hearing is not fairly stated in the affidavit and the affidavit utterly failed to present to the Court the true facts and circumstances upon which a judicial determination could be made as to whether an ex parte order should have issued.

6. Revenue Agents are not the sole judges of the scope of an examination, especially where there is involved the basic question of whether income earned outside of the United States is reportable or taxable. The matter which I shall hereinafter set forth will demonstrate that the request of the Internal Revenue Service is arbitrary, unwarranted, beyond the powers granted by statute, and would constitute a violation of my constitutional rights.

7. Accordingly, this motion is made to vacate the ex parte order obtained on August 22, 1956, to vacate and quash the summons issued by the Internal Revenue Service under date of December 6, 1955, and to grant respondent such other relief as may be necessary as a matter of fairness and justice and for the protection of his constitutional rights.

PROPER LEGAL SCOPE OF EXAMINATION

8. A memorandum of law, which will be submitted to this Honorable Court upon the hearing of this motion, sets forth certain basic principles which the Internal Revenue Agents are either unfamiliar with or seek to disregard. Those principles are:

(a) A citizen of the United States who is a bona fide resident of a foreign country for an entire taxable year, is not required to include in this gross income amounts of money received from sources outside of the United States for personal services rendered by him outside of the

United States during said period and said income is exempt from taxation. The law is very (51) clear—even mandatory in language: Section 116 Internal Revenue Code 1939, now Section 911 Internal Revenue Code 1954 specifically states that such income "*shall not be included in gross income and shall be exempt from taxation*". Sec. 22, Sub. (b) 8. Int. Rev. Code 1939, is to the same effect.

(b) That books and records of earnings and expenditures are required to be kept only by persons who are liable and required to pay taxes to the United States. On this subject, the statute is also quite clear. The statute does not require *all persons* or *all* citizens of the United States to keep books and records but only those liable to taxation. Section 54A Internal Revenue Code 1939; now Section 6001 Internal Revenue Code 1954 reads, "every person *liable to any tax imposed by this chapter* * * * shall keep such records", etc. It follows that if no tax liability is imposed under the statute, that there is no requirement to keep books and records.

(c) The law does not authorize Internal Revenue Agents to examine everyone and anyone about any and all subjects, nor does it permit them to examine any and all books and records. The powers are very limited (Section 3614 Internal Revenue Code 1939 now 7602 Internal Revenue Code 1954). They are limited to examination "bearing upon matters required to be included in the return". If, as in this case, the information sought is *not matter required to be included in a return* but involves foreign income which, the law says is neither reportable or taxable, then the Internal Revenue Agents lack the power to elicit the information, and the ex parte order dated August 22, 1956, should accordingly be vacated. The language of this statute was changed slightly in the 1954 Internal Revenue Code, which was passed after the events here involved took place, but at the Congressional hearings it was stated that

the meaning of the 1954 enactment was the same as under the 1939 code.

(52) Persons falling within the purview of Section 116 Internal Revenue Code, 1939, are not required even to file a return covering their foreign income (Internal Revenue Regulations 111 Sec. 29.116-1). See also I. T. 2286 V-1; CB52; 502 CCH-P.3678 Sec. 840. Why then should they be required to tell the government agents about it? No return need be filed on such foreign income and same is not reportable or taxable.

(d) Section 116 Internal Revenue Code 1939 which was in effect during the years in question (now Sec. 911 of the 1954 Code), provides that the benefits of the section accrue to citizens of the United States who establish to the satisfaction of the Commissioner that he was a bona fide resident of a foreign country or countries for the pertinent period. This language implies that an opportunity be given to the foreign resident to establish that fact. It implies further a mandate to the Commissioner to establish a procedure to enable the citizen so to do. No such procedure has been established. Repeated requests to the Internal Revenue agents, as to the Commissioner's evidentiary requirements in this respect, have been made. The answer was that there are no set rules.

In the instant case I offered to establish my bona fide residence in a foreign country by the orthodox methods of oral testimony under oath or affidavits or both, at the option of the government. My own testimony on the subject was disregarded and the right to support it by the testimony of others was denied. See transcript of hearings held August 17th and August 26, 1956, extracted in part in Exhibit 1 hereto attached.

The allegations of Mr. Roberts in his affidavit in support of the ex parte order to the effect that I took the position that "the government is compelled to prove that

respondent (Carroll) is *not* a bona fide resident of Germany", is untrue and contrary to the facts. Its falsity is apparent from the record (53) of the hearings and is more fully dealt with later.

My Bona Fide Residence in Germany

9. Before stating the facts, I wish to point out that this is not a case of an attempt to avoid paying to the United States any tax which the law says I must pay. Statutes which have been repeatedly re-enacted over a period of years for good reason demonstrated at Congressional Hearings, specifically exempt both the reporting and the paying of taxes by a bona fide foreign resident, such as myself, on certain personal earnings.

I wish to point out further that this is not a case involving any element of fraud. I have repeatedly stated that, if it is ultimately decided that I am taxable on my foreign income despite the language of Section 116 and the decided cases on the subject, that I will pay same. What the Internal Revenue Agents are trying to do, as this Honorable Court will readily perceive from the facts hereinafter recited, is to arbitrarily assess me before determining whether or not there is any tax liability, and to harass me into giving them sufficient information on which to base such arbitrary assessment. As stated above, they have disregarded my sworn testimony as to my bona fide residence in Germany during the pertinent period. They have also disregarded confirmation thereof by an investigating team of Internal Revenue Agents who conducted an investigation "on the spot" in Germany and they have refused to take either evidence or affidavits respecting my foreign residence. They have indicated that the only thing they wish to know is how much my foreign income totals.

This Honorable Court will also note that the ex parte Order, here sought to be vacated calls only for information and records respecting amounts of income received for professional services which I rendered overseas for foreign Nationals and not information bearing on my bona fide foreign (54) residence, (pars. 1, 2 & 3 of ex parte order dated August 22, 1956). The transcript of the hearings establishes, beyond doubt, that I was a bona fide foreign resident during the period in question, a fact which the Revenue Agents prefer to ignore. My position is and has always been that since my foreign income is not taxable income, required to be stated in a return, that the agents are without power to compel me to give them the information or to produce any records of such foreign income (Local 174 vs. United States 56-1 USTC # 9136, C.C.A. 9, not otherwise reported). In any event, records concerning such income are not presently available and can only be reconstructed at the expense of a great deal of time and money, if indeed, an adequate reconstruction is at all possible.

10. At the hearing before the Agents, I undertook fully to cooperate and in order for them to determine whether there was any possible basis for any tax liability, I willingly testified as to all matters relevant to my residence in Germany. No facts were developed by the Government which impaired my overwhelming showing that I was a bona fide resident of Germany during the period in question. I believe that I satisfied, beyond any doubt, the responsibility which rested upon me of making such showing. Moreover, I was then prepared, as I am now prepared, to substantiate all of the contentions made by me with respect to my said residence. However, notwithstanding the overwhelming proof on the subject, the Agent persisted in questioning me as to the details of my

financial arrangements with clients in Germany and the moneys received by me from them. I objected to any such testimony on the ground that the evidence already given which I was prepared further to substantiate, established that the income received by me from German sources was not reportable and not taxable, and the effort to question me as to the amounts of such income was an arbitrary and unwarranted effort to probe into my private affairs and could have no reasonable relationship to any reportable income or income tax liability.

(55) The Facts as to my Residence

11. I was born in San Francisco, California, on March 4, 1904. I was educated there, lived there and earned my livelihood there until the outbreak of World War II. Soon after the outbreak of the War, I gave up my law practice and volunteered for Military Service. I was assigned to the pilot's instructors school of the U. S. Army Air Corps at Mather Field, Sacramento, California, and was thereafter commissioned a 1st Lieutenant. In 1943, I was asigned to duty in England as a flying officer with the Eighth Air Force Service Command. Subsequently, I was promoted to Captain and finally honorably separated in September, 1946 in the rank of Major.

12. Following the termination of hostilities in Europe, I was assigned to the Judge Advocate Section, and in that capacity, prosecuted and defended a number of military cases including several cases which received wide publicity. Some of my cases involved intricate and interesting questions of international law. Others involved post-war problems. These subjects fascinated me. Wide publicity was attendant upon my activities. Numerous requests to represent persons, in matters involving these

types of problems, were received even while I was still in uniform. It was then that I resolved to take up residence in Germany and to engage in the type of law practice there that I thought I would most enjoy. The post-war problems in Germany were vast. I felt that I could do much better in Germany than I could if I resumed law practice in California. Accordingly, I made all the necessary arrangements to live and engage in the practice of law in Germany.

The military authorities returned me to the U. S. in September, 1946 to be separated from service. After Honorable separation and while still on terminal leave, I visited California to see my wife and friends, whom I had not seen in over three years. I informed them of my plans and in November, 1946 returned (56) to Germany as a civilian.

13. Soon after arriving in Germany, I opened an office and also established a residence. While I preferred to be in Frankfurt, it was because of the housing conditions that I was obliged to live and maintain my office in Hoechst, a suburb of Frankfurt. I engaged the services of a secretary, an assistant, and a German law student, all German Nationals. I established myself in the community, and lived and worked in the same manner that persons usually live and work in any community. My law practice grew rapidly. I was content with my life and work in Germany and intended to remain there indefinitely. I did not return, and had no plans of returning to the United States during the months and years that followed.

14. In October 1947, I was retained by Mr. Alfried Krupp Von Bohlen and Halbach, a German Industrialist, to represent him before U. S. Military Tribunal No. 7, convened by the United States Military Authorities in

Nurenburg, Germany. I filed Notice of Appearance in the normal course, and upon my entering the courtroom to take up my duties, I was arrested and taken before General Lucius D. Clay, then Military Governor of the United States Zone of Occupied Germany. General Clay informed me that pursuant to an agreement which he entered into with the British Military Authorities that neither British or American lawyers would be permitted to represent German nationals in any of the so-called Nurenburg trials. Upon my insistence of Mr. Krupp's right to counsel of his own selection and my right, as a lawyer, to represent him, General Clay ordered me evicted from Germany. The eviction edict was carried out on January 13, 1948.

I determined to appeal to higher authority from General Clay's order and to return immediately to Germany. Steps towards that end were taken in Washington when I arrived in the United States, but to no avails. I was denied re-entry although repeated applications were made. I had left behind, in Germany, (57) a fully equipped law office, my files, my law practice, three employees, my home, my personal clothing, an automobile, and other items of personal property.

15. Military approval to enter Germany was required during the early days of the occupation and being unable to obtain same, I was forced to remain away. In March 1949, after the Krupp trial and appellate proceedings were concluded and after certain of the military restrictions had been lifted, I was again permitted to and did return to Germany.

16. All housing of Allied Nationals was, at that time, required to be procured from a military housing authority. The housing facilities in Frankfurt were very limited due to the vast wartime destruction. The Military Au-

thorities permitted me to rent an apartment at 119 Hansa Allee in Frankfurt, Germany, where I resided until the end of the year 1949, or the beginning of the following year, when the housing restrictions were relaxed. I then rented a room, which was the best I could obtain, in a private German house. I also sub-leased office space from a German attorney at 24 Rheinstrasse, Frankfurt, and established my office there. For the next five and one-half years, I lived in or near the city of Frankfurt, Germany, and conducted my law practice there.

17. During the entire year of 1950, I lived in the home of a German family at 7 Barckhausstrasse, Frankfurt, where I rented a room. From approximately February 1951 to February 1955, I lived in a house which I leased at all Guldensollerweg in Bad Homberg, a suburb of Frankfurt. There, I employed my own housekeeper. This employee was in addition to my office staff. Prior to the expiration of the lease on my Bad Homberg House, I moved to the Hotel Frankfurterhof in Frankfurt, because I found it more convenient to live in the city. I continued to keep my personal (58) belongings in the leased premises at Bad Homberg, including my two large dogs. During this period, I owned two horses which I rode frequently. I kept them in a stable on the outskirts of Frankfurt. I owned two automobiles, one of which I garaged in my house in Bad Homberg, and the other I garaged in Frankfurt. I lived at the Hotel Frankfurterhof until March 1955 when I gave up my home and office in Germany and moved to Switzerland, where I now reside.

18. During the years I lived in Germany, I entered into the social and business life of the community. I became a member of the Frankfurt Press Club, the American Legion (Frankfurt Post), the Association of Ameri-

can Lawyers in Europe. I was admitted to the local American Courts functioning there. I made numerous friends among the German people, whom I entertained, and who in turn, entertained me. Although business and pleasure trips took me to various parts of Europe for short periods of time, my home and my business continued in Frankfurt, Germany, without interruption—from November 1946 to March 1955—almost nine years except for the period in 1948 when I was prevented from being in my home and office by order of General Clay, as hereinabove related.

In 1949, I did not return to the United States at all.

In 1950, I did not return to the United States at all.

In 1951, I did not return to the United States at all.

In 1952, and after the lapse of almost three years, since my last arrival in Germany, I flew to the United States for the first time for the specific purpose of appearing before the Board of Military Appeals to argue an appeal for Capt. John D'Angles from his conviction by an Air Force Court Martial, (59) which sat in Germany and Italy and in which trial I appeared as his counsel. I was in the United States six or seven days. When my work was finished, I returned directly to my home and business in Frankfurt.

One and one-half years later, in December 1953, I again went to Washington, this time for the specific purpose of representing Mr. William Clark, Chief Justice of the Court of Appeals for the Allied High Commission, in a State Department matter. I was there a few days and returned to Germany directly.

Late in 1954, I made another trip to the United States in connection with an action then pending before a Swiss Court. On that occasion, I was here approximately eight or ten days.

Thus, during the many years that I lived in Germany, I made only three trips to the United States, each for a very

short period, and each in connection with a specific matter which required my attendance here. On none of these occasions did I go to California. I cannot imagine how in the light of the facts here set forth, it can be said, that I was not a bona fide resident of a foreign country, during each and every one of the years in question. Certainly, it can not be said that I was only a "transient" living for almost nine years in the City of Frankfurt. Yet that seems to be the Government's position.

While my bona fide residence had been clearly established, I offered at the hearing before the Agent to present further substantiating proof. A wealth of such substantiating proof can be furnished by me. Illustrative of such substantiating proof are the affidavits, attached hereto, of several persons who have personal knowledge respecting my residence and business activities in Germany.

19. These persons happen to be presently available (60) to give their affidavit. I can obtain one hundred or two hundred additional affidavits, all to the same effect, if necessary (but counsel has advised that they would be merely cumulative). I can not imagine what more the Government agents desire in order for me to establish bona fide foreign residence, if in fact, they want any information to determine my residence status at all. It appears they are not interested in this subject. Indeed, they have refused my proffer of proof and have refused to say what proof of bona fide residence they want. They seek only information as to the amount of my foreign income, during the period of such bona fide foreign residency, which certainly on the face of things, is not reportable or taxable.

By the character of the information sought to be elicited under the ex parte order and by statements made by the Internal Revenue Agents on the record of hearings heretofore had, it becomes apparent that they are not interested in the bona fide residence question, which is the crux of the

whole matter. See Exhibit 1 hereto attached and made a part of this affidavit. I can only conclude that their action is highly arbitrary and designed toward imposing an unwarranted arbitrary assessment with resultant hardship to myself.

20. I respectfully state to this Honorable Court, in all sincerity, that I am at a loss to understand why the statutes, which Congress in its wisdom saw fit to repeatedly enact, and the many decisions of our Federal Courts on this subject are so blatantly discarded by the Government Agents, and I respectfully ask this Honorable Court to grant me appropriate relief from their arbitrary action. The case of Meals v. United States, 110 Fed. Supp. 658 which reviews the authorities as well as the history of the statute in question (Sec. 116, Int. Rev. Code 1939), and other Federal cases were called to the agents' attention but (61) fell upon deaf ears. The amounts of my non-taxable income is all they want.

21. During the time I was in Military Service and the years thereafter, in which I engaged in law practice in Europe, full and complete tax returns were filed on the income which I received in the United States. They were filed by my wife acting under a power of attorney which I gave her in the early days of the war.

22. During the period of my enforced absence from Germany, pursuant to General Clay's order, I was contacted by an Internal Revenue Agent in California, to whom I fully explained my situation. I told him of my intention to return to my home in Germany and resume my law practice there as soon as I could get an entry permit. Thereafter, and on several occasions, I was contacted and interrogated by the Internal Revenue Agents at my office and residence in Germany. Reference was made to my foreign

residence and my foreign income and they were advised of the fact that I was neither reporting or paying United States taxes thereon. None of said agents questioned the propriety of my actions. Firsthand information was available to them both as to my residence and my activities as a lawyer. These agents were on the scene. They could see for themselves and had full knowledge of the fact that I was actually residing in Germany and actively engaged in the practice of law there. They saw a law office fully equipped with books, records and files and witnessed the activity in which I was engaged. They agreed that my foreign income was not reportable or taxable, no request for the production of any books or records pertaining to such income was made. Nor were a set of account books kept.

Disregarding the findings and conclusions of the Internal Revenue Agents who were on the scene, other agents, attached to the California office, continued their activities. In October 1953, I received an inquiry as to when I was expected (62) to return to the United States. I cabled as follows: "Director Internal Revenue, San Francisco, California: Attention Leroy reference your inquiry concerning my returning United States stop intend continuing residence Europe indefinitely may return for short visit early next year stop if matter cannot be postponed please communicate with me twenty four Rheinstrasse Frankfurt, Germany—Earl Carroll". The agents had this cable in their file.

23. It should be pointed out that agents representing the Internal Revenue Department in Germany were from time to time invited to appear before various organizations of U. S. citizens living in Germany to discuss the question of the tax liability of such citizens engaged in business there. These agents advised that income derived from personal services rendered outside of the U. S. for which compensation was received from sources without the United States,

was neither reportable or taxable. They distinguished income derived from the profits of a business enterprise or investment, etc. A written opinion to this effect, in the form of a letter in reply to an inquiry, was at one time posted on the bulletin board of the Frankfurt Press Club, of which I was then a member.

24. The Internal Revenue Department had numerous representatives stationed in Europe during the period of my residence there. In Frankfurt a/m, Germany, they had an office at 21 Siesmayerstrasse with the United States Consulate. There were several thousand U. S. Citizens engaged in various occupations and professions in Germany during this period. As a practicing attorney, a considerable number of such persons consulted me in regard to their income tax liability for income derived from earnings outside of the United States. In each instance, in which they were able to point out to the Internal Revenue Agent, that they were bona fide residents of Germany for the statutory period, inquiry as to the amount of their earnings was not made. It was (63) conceded by the Agents there that even a return did not have to be filed under existing Treasury Department Regulations. Information was not sought, as is now being done in my case, respecting amounts of foreign earned income or expenditures.

25. Much ado is made in my case to the effect that my wife, who signed and filed my returns on domestic income for a number of years, listed the office of an insurance business, which she operates in California, as my address, and on one or two occasions, listed her home address. (Record of hearings, August 16, 1956, page 24.) But how does this alter the fact that I actually resided in Germany? (See Myers v. Commissioner of Internal Revenue, 180 Fed. 2nd 969, 4th Circuit.)

Affidavit of Earl J. Carroll.

The Record shows (pages 23-24) that Mrs. Carroll, when forwarding the 1949 Return to the Collector of Internal Revenue, wrote as follows: "I am enclosing return for 1949. This is the best I can do as my husband is in Germany. He left March 22nd. I have no way of knowing when he will return. Signed—Georgeanna Corroll".

26. Much ado is made also of the fact that a military entry permit was needed to remain in Germany during the early post-war days, and that some of my law practice was before occupation tribunals and courts-martial. The case of Meals v. United States, 110 Fed. Supp. 658, and the authorities therein cited, is a complete answer to these contentions which the government agents again raise, although the Federal and Tax Courts of the United States have repeatedly ruled against them. Fuller v. Hofferbert, 204 Fed. 2nd 592, 6th Circuit, decided May 29, 1953.

In the Meals case supra, the District Judge found, as immaterial to the issue of bona fide residence, the very contentions which are again raised in my case. Mr. Meals was in Germany for less than 16 months—from late 1945 to early 1947. (64) He worked for the American Telephone Company, whose telephone service was restricted to use by American and allied civilian and military personnel in Germany. Like all civilians in Germany at the time, Meals needed a military entry permit. Like others, including myself, prior to 1950, his apartment was secured through the military housing authority. Meals, moreover, was dependent upon the military for logistic support denied to me. He was authorized the use of the Army Post-Exchange and other army facilities. As distinguished from the class of American citizens who were authorized to use the military facilities, I was not permitted to use even the medical facilities. In 1950 I was treated by German physicians in a German hospital for injuries received in an automobile accident. In 1952 I was hospitalized in a German hospital

for about six weeks. During the entire period of my residence in Germany, all medical and dental treatment received by me was from private German doctors engaged at my own expense. This because I was not within the eligible group. Meals, however, who was within the eligible group receiving logistic support from the United States Army was nevertheless found to be a bona fide resident.

It should be pointed out further that Meals paid no income tax to the German Government, a factor which the District Judge said "is of little significance in determining whether he is a bona fide resident there".

Although Mr. Meals' stay in Frankfurt was for only fifteen or sixteen months. as contrasted with my stay for over nine years, the Court found that he was a bona fide foreign resident and exempt from United States taxation under Section 116 of the Internal Revenue Code 1939. All the authorities are to the same effect. (See memorandum of law submitted herewith.)

(65) AFFIDAVIT OF INTERNAL REVENUE AGENT

27. The affidavit of Mr. Bernard B. Roberts, Internal Revenue Agent, dated August 21, 1956 submitted in support of the ex parte order, here sought to be vacated is unfortunately, not correct, and contains a number of misstatements of fact. To take them up seriatim:

The first two paragraphs of Mr. Roberts' affidavit cite only formal allegations. Paragraph 3 is incorrect to the extent that it states that I requested extensions in order to "procure necessary records and other reasons". The fact is that the extensions were requested and obtained because I was preoccupied with other matters in Europe, and the correspondence between the Internal Revenue Department and myself so indicates.

Paragraph 4C of Mr. Roberts' affidavit states that I answered all questions prepounded to me except questions

concerning "*contractual and financial terms*" of my legal representation of: (a) Krupp (b) Flick (c) "other income earned in Germany or other foreign countries during the years 1944 to 1954 inclusive".

With respect to (a) and (b), I answered questions prepounded concerning the contractual relationship generally but refused to state the amounts received from these two clients for reasons hereinabove set forth, which reasons were recorded at the time. It was and is my position, as stated above; that the agents are not legally authorized to obtain that information; that their inquisitorial powers are specifically limited by law and furthermore that these matters involve confidences between attorney and client which by law are not required to be revealed.

As for item (c), I gave full information covering many pages of testimony respecting other income from 1944 to 1954. During the years 1942, 1943, 1944, 1945 and most of 1946, I was in Military Service, and it certainly could not be expected that I would keep books and records covering Army pay. From September 1946 to March 1955, my residence was in Germany, where (66) I actually lived except for the enforced absence from January 1948 to March 1949 by reason of General Clay's order. My income during said period was from foreign sources for legal services performed in Germany, and as a matter of law, I was not required to keep any records of such income. I nevertheless testified, as nearly as I could remember, concerning all the cases which the government agents inquired about, excepting Krupp and Flick. These are much more involved and the clients do not wish unnecessary disclosure.

25 Paragraph 5 of Mr. Roberts' affidavit states that I "failed to produce for examination in books, records and papers pursuant to the subpoena". To put it succinctly—I cannot produce what I do not have and what is nonexistent. I have some records of expenditures which show

payments to various shopkeepers, merchants and others, all in Germany, as well as payments for salaries, rents, telephone, living and office costs and other expenses, which I incurred in Germany. These records bear directly on my foreign residence, but the Internal Revenue agents do not want them. They were never subpoenaed or requested. The ex parte order does not call for them. The summons does not call for them and at two protracted hearings I was not questioned about them. It should be obvious that the Internal Revenue Agents are not seeking information concerning my status under Section 116 or 911 of the Internal Revenue Code, as they said they were, but only specific information in order to make an arbitrary assessment and force me either into a settlement or into protracted litigation. Their questioning and their request for information pointed unequivocally in that direction (See Exhibit 1).

29. The statements contained in paragraphs 6, 7, 8 and 9 of the affidavit, are incredible. Where and how it was conceived that I declined to answer certain questions or produce records, "on the ground that the government is compelled to prove that respondent (Carroll) is *not* a bona fide resident etc.", is a (67) complete mystery to me. That specific statement is made in Mr. Roberts' affidavit in paragraphs 6 and 7 and repeated in paragraph 9.

In paragraph 9, he goes further and states that the ex parte order was sought because Carroll "has placed the burden of proof as to residency on the government as the ground for his refusal to answer or to produce his records for examination". Surely Mr. Roberts who was present at the hearings heard my testimony. He himself, along with the other two agents, took part in the questioning. He must know that nothing of that nature was said by myself or my attorney (Mr. Joseph S. Robinson), either on or off the record. That never was my position. My

position was just the contrary. (See Exhibits 1 and 2 attached to this affidavit.)

I stated repeatedly that I realized that the burden was on me to establish my bona fide foreign residence. I testified that my foreign income consisted of fees received by me from sources without the United States for services performed by me outside the United States during the period of my residence outside the United States. I repeatedly asked what the Government wanted in the way of proof other than what I had already supplied. An offer was made on the record to produce supporting affidavits of one hundred or more witnesses or to take the testimony of these people in support of these facts. The offer was rejected and I was foreclosed from such proof. Instead, I was told that the only thing the Government wanted was the amount of the fees which I earned from Krupp and Flick, which, of course, has no relevancy at all to the issue of bona fide foreign residence, the place and time of performance of personal services or the source of payment for such services.

30. My attorney asked directly what difference it makes whether a man earned $100 or $50,000? Is the amount of income a factor which the Commissioner considers in determining the citizen's status under 116? My attorney also stated that the law did not contemplate that the Commissioner should be influenced in his determination by the amount of earnings as this may lead (68) to discrimination and a tax levy against the larger earners. It all went for naught. How much did I receive from these two sources is all they wanted to know. (See Exhibit 1 hereto attached.)

It was never contended as Mr. Roberts alleges, that the Government must prove that I was *not* a bona fide resident. This statement which appears several times in Mr. Roberts affidavit is untrue and a complete reversal of my stated position. To assign same as a basis for obtaining an ex

parte order is, in my opinion, tantamount to a fraud upon the Federal Judge to whom the application for the ex parte order was presented.

31. The practice of making incorrect statements did not stop there. Mr. Roberts also sought to infer in paragraph 11 of his affidavit that I would "leave the jurisdiction" and that a Federal Court ex parte order, without notice of application to anyone, was therefore necessary. He said that the Internal Revenue Service (meaning himself), "has every reason to believe the respondent may shortly leave the United States and the jurisdiction of the Internal Revenue Service for some time to come". He apparently did not see fit to correctly advise the Federal Judge on the ex parte application, that he was advised that I had come from Europe at my own expense and at great inconvenience, to answer the summons of the Internal Revenue Service, and intended to remain here until this entire matter was settled. At the conclusion of the proceedings held on August 16, 1956, I testified in this respect as follows (page 96): "I am still residing over-seas and am returning to Switzerland in a short period of time after this matter for which I have come over specifically, has been cleared up. I have not returned to the United States really since 1946." I am a lawyer and I respectfully call these matters to the attention of this Honorable Court because I resent the inference that I would violate my oath or disobey any process of our Courts. I am at a loss to understand why Mr. Roberts had made all these untrue state-
(69) ments, but they are a part of the files of this Court for all to see.

32. In addition to what Mr. Roberts said in his own affidavit, it appears that he informed the United States Attorney "that I have no permanent residence and that I am likely to leave the jurisdiction * * *". (See affidavit of

Mr. Foster Bam, Asst. U. S. Atty., dated August 21, 1956.) I have a permanent address and Mr. Roberts know it. He personally examined my American passport. My address is Villa D'Este, Montmollin, Switzerland. There I occupy an eight room house under a lease which has approximately two years to run; I own all the furniture; I employ a housekeeper and a general handy man. My automobiles are there. It is my home and I expect to return there. If what Mr. Roberts meant to convey was that I have no residence in the United States, then he was correct. My residence has been at Frankfurt, Germany, as hereinabove set forth, for 9 years—1946 to 1955, and thereafter in Switzerland, first at the Touring Hotel situated in Neuchatel and now at the Villa D'Este, Montmollin, a village near Neuchatel.

33. I returned to New York in August to testify pursuant to a summons. At the hearing, three Internal Revenue Agents appeared although the summons required me to appear before one, Mr. L. Harold Moss. Before being sworn, a statement was made by Mr. Moss, which was omitted from the record, to the effect that Mr. Kisthardt, a special agent from California, was assigned to conduct the inquiry because of his familiarity with the subject resulting from other investigations. My attorney inquired as to the nature and the purpose of the inquiry and was informed that it was to determine whether or not I was a bona fide resident of a foreign country in order that my tax liability may be determined. I stated to the agents present that this subject had been (70) investigated by other agents many times before, nevertheless I would give them the information again. I was then asked a whole series of questions. It was not too long thereafter, however, that I discovered that the agents were little concerned with the question of my bona fide residence. The

search was for something else. (See Exhibit 1 hereto attached.)

On the adjourned date, Mr. Moss, before whom I was summoned to appear, was not present. The record, however, records him present, but like many other things in the record, it is inaccurate. At the end of said hearing, the agents foreclosed my introducing any proof or submitting any evidence bearing on the question of foreign residence even though at the outset of the first day's hearing, I was told that that was the purpose of the inquiry. Mr. Roberts made a closing comment, "There will be a time and place set, Mr. Robinson, for *that* type of evidence". Not being successful in eliciting what they wanted, the agents abruptly closed the examination and served me with the ex parte order here sought to be vacated.

TRANSCRIPT OF HEARINGS

34. Their transcript of those hearings, which will be submitted to this Honorable Court, is so riddled with errors, misstatements and omissions, that correction is impossible without a meeting between the agents, myself and the reporter along with her stenographic notes (See letter attached marked Exhibit III). Rather than delay this application until such meeting can be had, use of the record is being made even though same is erroneous in many respects. It is cautioned however, that same is not fully reliable. Many answers of mine are omitted; various statements by my attorney and myself are omitted or inaccurately recorded. Many of the agents' questions and statements are inaccurate—some even changed. A number of matters recorded appear to have been taken (71) from thin air. I am sure that the agents will agree with my criticism of the record.

To cite a few examples: Page 17, hearings 8/27/56—statement by Mr. Robinson to the agents: "You said this was a hearing on whether or not he was a bona fide resident". Mr. Roberts: "I do not doubt that statement was made". The transcript was then changed and the word "doubt" stricken out and in its place the word "believe" was inserted. It was initialed, "B.V.R.", so that now the answer reads, "I do not believe that statement was made". The new answer is the direct opposite of the recorded answer and of the facts, as the record shows in the admission of Special Agent Kisthardt as follows: (Mr. Robinson) "My understanding was at the outset that this hearing was to determine whether or not Mr. Carroll was a bona fide resident in Germany for the period in question". (Mr. Kisthardt) "That was part of it. Yes."

Another example, page 56 hearings 8/16/56—question addressed to Mr. Carroll: "Your services to Krupp extended over a period that you just mentioned, 1947 to about * * *" Answer: "To about 1953". Mr. Robinson: "No, actually they still continue". The actual statement made by Mr. Robinson was, "No, they still continued thereafter". The services do *not* still continue but they continued after 1953. The record however, would have it appear that right up to the present time, I am still rendering legal services for Mr. Krupp which is *not* a fact.

At another place in the record, page 49, hearings 8/16/56, I was asked: "What would you have done with property (Krupp property) in the United States?" Attorney: "He does not have to answer that". Question: "What did you do"? Attorney: "I object to that. It is not material. There was plenty done with regard to property in the United States". Actually the statement made by my attorney was, "There was *nothing* done with regard (72) to property in the United States",—which *is* the fact.

Examples may be multiplied, but it would be almost an impossible task to obtain a correct transcript of the hear-

ing without a round-table conference of the parties concerned. In addition to an inaccurate record, the extracts from said record submitted in support of the ex parte order, do not correctly reflect what is contained in the transcript itself. As a result, we have inaccurate extracts from an inaccurate record. Obviously, little reliance can be placed thereon. Quoted portions of various parts of the transcript, which appear reasonably accurate, are attached to this affidavit as Exhibit 1. I do not mean, by my use of these portions to infer that there are not other parts which are likewise substantially correct.

35. Regardless of what is contained in the record or the inaccurate extracts taken therefrom and submitted on the application for the ex parte order, my position is and has been as related in this affidavit. The position of the Government appears to be that only by producing books and records—even though non-existent—of amounts received from Krupp and Flick, can I establish bona fide foreign resident under Section 116. Here the lines are drawn.

Such records as were kept of the insurance business and which related to the several returns filed by my wife covering my absentee interest in said business, have been examined by Internal Revenue agents over the years. Those records were not made by me, nor were they kept by me, and they are not now and never were in my possession, although I am advised by my wife they are available in San Francisco.

As for records relating to my foreign income—none were kept—the law does not require it of a bona fide foreign resident. The disposition of many old files, papers and other memoranda was explained to the Internal Revenue Agents. It is (73) recorded in substantially correct form in the transcript of the hearings. Records of expenditures are, in part, available, but the Government agents do not request same.

Affidavit of Earl J. Carroll.

IMPORTANCE OF QUESTION TO CITIZENS LIVING ABROAD

36. The problems which this Court is called upon to decide on this application, are not academic or confined to my case alone. Authoritative writers have stated that it is estimated that approximately 500,000 U. S. citizens live abroad, exclusive of military personnel (Exhibit IV). Many of them fall within the purview of Section 116 now 911. Are they required to reveal their foreign income as a condition preceedent to asserting bona fide foreign residence? Must they report to Internal Revenue Agents that which the law says shall not be included in gross income and is not taxable and on which income even a tax return need not be filed? Must not the Internal Revenue Service first rule on the question of bona fide residence before seeking disclosure of amount of foreign income? The law has limited Internal Revenue Agents' investigative powers to matters required to be stated in a return.

RELIEF REQUESTED

37. (a) *The ex parte order should be vacated*: The affidavit upon which it was based erroneously states that I declined to answer questions and produce records on the ground that the Government was "compelled to prove that respondent was not a bona fide resident of Germany". In fact, I recognized and satisfied the responsibility of establishing that I was, in fact, a bona fide resident of Germany during the period in question. The statutes protect me against any examination or investigation as to matters not required to be included in the return (Section 3614 of the Internal Revenue Code of 1939) and which are "unnecessary" (Section 3631 of the Internal Revenue Code of 1939; Local 174 v. United States—supra). In view of the statutory mandate that income from foreign sources

earned by (74) a citizen who has established that he was a bona fide resident of a foreign country "shall not be included in gross income and shall be exempt from taxation (Section 116 (a)(1) of the Internal Revenue Code of 1939). There was no jurisdiction in the Agent to investigate the amount of any such income, or for the Court to direct disclosure of any such amount, unless and until it might be determined that I was not in fact a bona fide resident. To require me to furnish such financial information, where I have demonstrated that any income from German sources is not reportable and the Government has failed to establish otherwise, would be oppressive, arbitrary and an evasion of my constitutional rights. As was stated by the Ninth Circuit in *Local 174* v. *United States*, 561 U.S.T.C. 9138 (CAA—9th, December 1955, not otherwise reported) "such a proceeding (to compel testimony and the production of records) is in the nature of a search and seizure which has constitutional overtones". Whether a party may be questioned as to certain matters is a judiciable matter for this Court.

(b) *The ex parte order is even more objectionable with respect to the production of any records or documents:* Surely I was under no obligation to maintain, or to produce, any records as to income which I was not required to report. Moreover, as the transcript of my testimony shows, I do not at the present time have in my possession or under my control any records or documents dealing with income received by me from German sources during the period in question.

(c) *Subpoena under date of December 6, 1955 should be quashed:* I have already testified fully "With respect to the matters required by law to be included" in any return or as to all matters "as may be relevant or material" to any inquiry. In view of the restriction imposed on the Internal Revenue Service by Section 7602 of the

Internal Revenue Code of 1954, and especially (75) in view of this statutory mandate set forth in Section 911 providing that my income from German sources "shall not be included in gross income and shall be exempt from taxation", the subpoena is wholly unnecessary and its existence can only serve to oppress me and subject me to vexatious burdens and hardships.

(d) *Power of Court to hold hearing*: I believe that in the hearing already held and the data submitted on this motion, I have demonstrated that my income from German sources during the period in question clearly is not reportable or subject to any taxation and accordingly the Court should vacate the ex parte order and quash the summons heretofore issued. However, if there is any doubt as to this I request that the Court hold a hearing at which I will have the opportunity further to substantiate the contentions which I have made. The relevance of the information requested by the Internal Revenue Service is not a matter to be arbitrarily resolved by it, but it is judiciable by this Court, especially under the unusual circumstances here present (see *Local 174* v. *United States, supra*). Petitioner invoked the jurisdiction of this Court and the Court has broad power to afford protection against any improper and inquisitorial examination. I submit that this Court without any further hearing should vacate the ex parte order and quash the summons upon the showing already made; but in any event this Court has the power to hold a judicial hearing to determine whether I was a bona fide resident of Germany.

OTHER MATTERS

38. If it should be determined that an inquiry into the amount of my income from German sources is not barred by my contention and offer to prove that any income from

German sources was not reportable or taxable under the statutory mandate (Section 116(a)(1) of the Internal Revenue Code of 1939), other questions of privilege or constitutionality may be presented as to such (76) inquiry and I respectfully reserve all rights with respect to any such questions.

39. I came to this country in August 1956 in order that the question of my residence in Germany during the period in question, and my exemption from the necessity of reporting income from German sources during such period, might be determined. This is the sole reason for my presence in the United States at the present time. I am anxious to have this question expeditiously determined. Although I testified before the Internal Revenue Service on August 16, and August 27, 1956, the transcript of such testimony, which was necessary for the making of this application, was not made available to me until September 14, 1956.

40. No previous application has been made for the relief requested to any Court or Judge.

WHEREFORE, I respectfully pray this Honorable Court for an order granting the relief requested herein.

(Sworn to by Earl J. Carroll on October 5, 1956.)

Exhibit I, Annexed to Affidavit of Earl J. Carroll.

(77) Extracts of Hearings before Internal Revenue Agents on August 16 and August 27, 1956, In the Matter of Earl J. Carroll.

Page 52—Attorney (Mr. J. S. Robinson appearing for Mr. Carroll): "I think the major question is was he a bona fide resident, outside of the United States for the period in question. The question is whether he is a bona fide resident. If you confine your questions to that I will not have any objection."

Question (By Mr. Kisthardt, Special Agent): "I have to determine how much money is involved."

Attorney: "I do not think that is an issue now."

Question (By Mr. Kisthardt): "I do not know whether he earned the money in Germany or the United States."

Answer (Mr. Carroll): "All of the services which I performed were performed in Europe."

Question (By Mr. Kisthardt): "Could you tell me how much you received from Krupp?"

Attorney: "I object—it is immaterial and irrelevant. The question is—is he taxable for the income received while he was a resident over-seas and I have that on authority from several very important tax lawyers—their advice was that information did not have to be disclosed. You are putting the cart before the horse. I object to him answering the question as to how much he received. . . ."

Page 58—Question (By Mr. Kisthardt): "When you speak about the tax liability you deal with figures."

Attorney: "Taxable income, yes. I do not have to tell you what I give my wife every week."

Exhibit I, Annexed to Affidavit of Earl J. Carroll.

Question (By Mr. Kisthardt): "That is not a deductible item on a tax return."

Attorney: "And this is not a taxable item, that is the point."

Page 90—Question (By Mr. Moss, Director International Operations Division): "It is about that time—there is only one other remark I want to make, it is this—up to now the information which is most essential to any kind of a determination on our part really has not been provided as set forth in the summons."

Answer: "What information are you referring to? I have asked any number of times what information you require to enable me to establish that I was a bona fide resident of Germany during the period of time in question and as a bona fide resident of other European countries. What do you require to establish bona fide residency during those years?"

(78) Question (By Mr. Moss): "Mr. Carroll, one thing for example, are some books and records, which would show the type of your activities, the names of your International cases, which we discussed earlier. We still do not know the names of any of these International cases. You said you could furnish them. We have seen no books or records. We know practically none of the amounts of your earnings from your International activities as contrasted with those in the Occupation or Military cases."

Answer: "What has that to do with bona fide residency? Is there any question in your mind that I was not physically present in Germany and living there during the period that I have stated?"

Question (By Mr. Moss): "No, Mr. Carroll, there is no question, but etc."

Exhibit I, Annexed to Affidavit of Earl J. Carroll.

Page 91—Mr. Carroll: "I want to get specific facts. I want on the record that I want to know specifically what you consider to be the facts on on which you predicate a bona fide residency. What facts have I not supplied?"

Question (By Mr. Moss): "I do not believe any information with regard to the other fees on cases, names, or amounts."

Page 92—Attorney: "I think both you gentlemen assume there are books and records."

Answer: "May I ask one question? What provision of the law requires me to, assuming that I am a bona fide resident of a country outside of the United States, what provision requires me to keep books and records during that period of bona fide residency?"

Question (By Mr. Moss): "I refer back to the provision which places the burden on the taxpayer to establish to the satisfaction of the Secretary or his delegate that you were a bona fide resident."

Answer: "That is not answering my question."

Page 94—Question (By Mr. Moss): "I would like to interject, Mr. Carroll, if you will review the Court cases on this question, you will find this—that the Court in determining whether a citizen has estabilshed a bona fide residence in a foreign country does not look at one or two things, it looks at many things and as an example one question is—what has the taxpayer done to remove his residence to a foreign country; to move his family to a foreign country; to give up his business activities; whether he participated in the local affairs of the foreign country;

(79) whether he pays taxes in the foreign country, and to that question you will not tell us whether you have or have not paid taxes in Germany and there are many facts which the Court weighs. We are trying to gather information on all of this, weigh it and evaluate it and come to a logical conclusion—so many things. You take the position that you consider yourself a bona fide resident and therefore I do not have to disclose any of this information to the Government."

Answer: "That is not my position. I do not think that is a fair analysis. I have read the cases and I agree with you that the Court takes into consideration many things to establish bona fide residency, but I have not read any cases where one of the elements is that you show books and records. I have not found any case that says bona fide residency is based on the amount of money you earned in a foreign country. The elements are other things. As I read the elements—one you show bona fide in good faith, move and live—establish a place of residence in a foreign country, not for the purpose of tax evasion, but you in fact live there. You sent a number of representatives to Germany. I have been advised by friends of mine that they made inquiries to determine whether or not I did in fact live there and came to the conclusion that was true, I did. I joined organizations. I centered my business life and social life in those countries. I can produce evidence to that effect. I have numbers of very fine friends I have established there. I entered the social life. I joined the organizations available to me, which I wanted to become a member of. I established an office. I furnished the office. I leased the office. I have conducted no business whatsoever in the United States during the time I have been over there. I turned my business over to my wife, who did not see fit to come to Europe. I have no other family besides my wife, so I cannot move any family I do not have. I do not know what I can do to establish

bona fide residency. What you are asking for books and records and amount of fees, I do not find in the decision cases as the elements of bona fide residency. I say that to you frankly and fairly, the cases do not hold the elements that enter into the determination of bona fide residency."

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(80) Page 13—(8/27/56) Question (By Mr. Kisthardt): "There is not anything in the Code or regulations which state that the Internal Revenue in making a determination of whether a person is a bona fide resident of a foreign country or not that they are restricted solely to the determination of whether or not the person is a bona fide resident of a foreign country, and we do not have access to the records. I cannot understand why you are so reluctant to produce your books and records if you say you are a bona fide resident, I do not see how that would harm you."

Answer: "I have told you any number of times—first of all you ask for books and records over a period of time, that is a considerable period past, and all books and records I ever had were merely memoranda of cash receipts and disbursements. There was no elaborate books and records kept."

Question (By Mr. Kisthardt): "You would have contracts and—"

Answer: "With what? When I represent a client you do not get a signed contract from a client. You make a verbal agreement with him as to a fee. You do not have formal signed contracts with clients. I made an original signed contract with Krupp. I was unable to perform it because Clay threw me out. That ended because Clay would not let me perform that contract. You do not go around getting signed contracts from people for services. The only other signed contract that I made was a contract that I made with Flick at the time. That contract—I was

in the same position—it had to be changed. Clay threw me out of Germany. I entered into further agreements with these people, which were oral agreements. I do not go around getting clients to sign. It is not like a commercial contract."

Question (By Mr. Kisthardt): "You state you did not have contracts."

Answer: "I had originally two contracts with Flick and Krupp. These contracts I could not perform because Clay evicted me. I made verbal agreements with these people to cover entirely different situations."

Attorney: "I am at a loss how the contracts or amounts received bear directly or indirectly on the question of resident. What I am concerned about your suggestion or any suggestion as to what the Department would recognize as proper procedure for us to introduce the proof that we think is proper and pertinent to the issue. You said several times the burden was on us. We want to meet the burden and introduce the testimony; not testimony you wish, it is testimony we think bears on the issue. Again I will ask what procedure would you prefer to follow so that we can call these witnesses. Off hand they will number one hundred or more. We may take affidavits in some cases such as this affidavit which I handed you a few moments ago. Before I forget it may we have it marked as Mr. Carroll's exhibit?"

(Request complied with)

"This is a new procedure for both of us and we want to follow the proper procedure."

Answer: "I can establish I was in Germany the time I say I was there—doing what I told you I was doing and

certainly if anybody was a bona fide resident of any country, I was of Germany (81). I think I can establish that in calling people who had personal knowledge of it. Some of them who have better information of exact dates than I have. By calling the proper witnesses I can get the exact dates. I can go to the Airplane Companies and get copies of the tickets and the dates of my arrival and can establish that I was there in the places indicated on those dates, and I know Germany was just a place that I picked out as a place to reside and did reside there, and there were hundreds and hundreds of people that knew it. I do not have to call them all I know that. I can call a substantial number to satisfy anybody of what I am telling is true—what I told you. There were about five agents investigating this thing very thoroughly. A lot of these trials in which I participated were highly publicized in the press and which you know yourself. It was reported in the newspapers over there, foreign press and American press. I can recall any number of newspaper reporters who knew me very well; know how I lived; where I lived, some are in the United States. I can think of at least a half dozen I can call within a matter of days, all who were staying there during this period whose business was to cover these activities."

Page 18. Attorney: "There must be Departmental rules on how this is to be handled. If this hearing is for the purpose of determining a bona fide resident then I know of no other way of doing it than producing testimony of witnesses. I will tell you this—that if I sat as a Judge and the same issue was involved, I would rule it was wholly irrelevant—any income showing receipts and disbursements, it does not bear on the question of whether or not the man was a bona fide resident of the country and

Exhibit I, Annexed to Affidavit of Earl J. Carroll.

I think I stated at our last hearing that it is immaterial whether or not this man made a hundred dollars or a thousand dollars or spent a hundred dollars or a thousand dollars, the issue is did he live there—was he physically there—was his home there, and was he a resident there within the decisions of our Federal Courts. Now again I say we will comply with any departmental rule or any reasonable rule you will suggest as to elicit this testimony. . . . "

Page 19—Answer: "The only way I ever kept any records at the time—they were in different little books and I have not been able to locate them. Little memorandum books as I have here. . . .

(Witness produces a small book approximately 3" by 5") which is a regular daily book—most of them have a place in the back for cash receipts and disbursements. If somebody gave me money I put it down. As far as the regular expenditures are concerned no record was kept. The law as I understand it—as it applied under 116 did not require me to keep any record nor to report that within the gross income. It excludes it from being reported. When you handle a law suit you do not set up a set of books. It is not at all necessary to do so, so there would not be anything in those books that would indicate anything at all as to the place where the services were performed or anything of that nature. They would not have anything of value, not a prohibitive value as to whether I was residing or where I was (82) residing or where I was residing nor would they have prohibitive value as to where the services were performed. I have to establish that."

Question (By Mr. Kisthardt): "You state that you maintained an International law office in Frankfurt?"

Answer: "Right."

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Question (By Mr. Kisthardt): "You would have paid the rent there and paid the help—why wouldn't that be an important factor in determining whether you did or not."

Answer: "Where those records were on an office that I maintained over a period of time and then discontinued, I do not know where they are. I asked them to ship them down to me. I have not received them. I had all my furniture and records—I ordered them shipped to Switzerland. I did not receive them. I do not know whether the Secretary I had attended to those things or not. When I was leaving the office I left it intact and asked them to ship my files of people I represented—it covered appearances that I made, but the only way that you can establish this is through the actual testimony of people who had knowledge of the fact. You want me to establish I went over to Germany. Another thing since our last meeting I have been reading at least fifty cases and I have not seen one case in the establishing of the question of bona fide residence that makes a reference to books and records."

Question (By Mr. Kisthardt): "The taxpayers had no reluctance in turning over the books and records so that the Internal Revenue could make a determination as to whether or not . . ."

Answer: "I cannot turn anything over I have not in my possession."

Question (By Mr. Kisthardt): "I cannot make a determination."

Answer: "I will have to make it through some other form of . . ."

Attorney: "There are other methods of establishing proof and you make reference to the question of a payment made to a Secretary. Certainly she may give testimony as to who she was employed by."

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Page 27—Question (By Mr. Roberts): "As I understand the situation now is this—we have summoned you to produce books and records and to testify as to the Krupp and Flick fees. I understand now that you do not wish to testify as to the amounts received from Krupp and Flick—am I right?"

Answer: "I am advised by my counsel that the questions you have addressed to me are not proper insofar as this investigation is concerned and I am following the advice of counsel employed to advise me in that matter. There seems to be a difference of opinion between you gentlemen and my counsel, I am not competent to resolve."

Question: "We have reached an impasse on that issue as between the Agents representing the Internal Revenue Service and yourself, as the taxpayer, and Mr. Robinson as your attorney."

Answer: "Not only Mr. Robinson. I would not limit it to Mr. Robinson—the advice of Mr. Robinson here today as my attorney in these proceedings, but the advice is not limited (83) to the advice received from Mr. Robinson. It is advice that Mr. Robinson has in turn, at my request, received from other counsel who are responsible tax experts."

Page 29—Question (By Mr. Roberts): "You understand, of course, that we are not satisfied with your response to the summons, which was served on you in Miami, Florida, in that you have not testified as to the requirements of that summons."

Answer: "I might say very frankly it would be impossible to answer such questions as to what fees did you get—what money did you expend from memory. The matter is very complicated and covers a period of time—it would be impossible to give positive answers in that event."

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Attorney: "I am wondering whether we should have an adjournment today. We can possibly secure about twenty witnesses in the New York area, who at one time resided in Germany either for part or all of the period in question and know Mr. Carroll personally. They know of his activities. They know where and how he lived. They have had conversations with him about his residence and other matters. Their testimony would be material to the issue of bona fide resident and I think if we have an adjournment today for six weeks or one month we can get as many of these affidavits together as are necessary.

(Off the record discussion)

I say there are a good many and to my mind more than one method of establishing proof. Oral testimony of persons who have personal knowledge is as good as any and I would like to produce their testimony and I would suggest, if it is all right or will be agreeable to you, we have an adjournment today to continue this hearing. It depends upon your side, Mr. Kisthardt and Mr. Roberts. You fellows probably have many matters to look after —if it would be convenient to you. We will in some instances obtain affidavits."

Question (By Mr. Kisthardt): "Mr. Robinson and Mr. Carroll, Mr. Roberts is concerned with your summons on December 6, 1955 . . ."

Page 31—Answer (Mr. Carroll): "I might say this about the books and records—when I decided to shift operations from Germany in March 1955, I turned my entire office, lock, stock and barrel over to Arthur Freedman in order that he could continue that practice. It was

a transfer of the entire business to him and the records that you asked for and requested from me were not in my possession in any of the times you asked me. In the last hearing you indicated you wanted these records and I told you at that time I did not think they were material, I would consult with tax lawyers to find out if they were. I found out they were not material. However, I sent for the records and as of the time I left Europe, the 3rd of August, I had not located (84) them. They were not in my possession and not now except I understand that they have been sent to Switzerland. How much of the records of my original office dated back to 1946 were retained by Mr. Freedman I do not know. I have no way of telling, so when you say—show me your records—when I transferred the entire business to some one else, you are asking for something I cannot give you. You made an investigation and I think you found that Mr. Freedman had taken over that business, lock, stock and barrel. He had taken over the outstanding cases the time I left—had taken over my entire practice so I do not have those records. Any more than any business would have the records if they sold that business to another. I gave him the business. I did not sell it. If the business had been taken over by some one else, it had turned the entire matter over to some one else, it becomes some one else's—for them to do what they see fit with it. My understanding of the law that all of the records pertaining to earnings—professional services rendered while I was a bona fide resident of Germany—my understanding of the law—my advice from counsel, it was not necessary for me to maintain those records. They were not reportable. So I did not give this matter any thought until the first time you served this subpoena on me while I was here on another matter. I have done what I could do to produce the records. I do not know what else I can do. I think the record

should show at that time I asked what it was that you wanted in the form of proof to establish that I was a bona fide resident and you gave me no such information. I asked whether there was a regulation covering the matter—to tell me so that I could comply with it. I was told there was no regulation. Apparently there is none today. Is there a regulation as to what a taxpayer, who is a bona fide resident of a foreign country has to do insofar as maintaining records is concerned? It pertains to that type of a taxpayer."

Question (By Mr. Kisthardt): "The Code, Mr. Carroll, Section 116-A of the 1939 Code and Section 911 of the 1954 Code specifically states that the burden of proof of the bona fide residency claim of the taxpayer is on the taxpayer."

Answer: "Where is there any regulation as to books and records as a part of establishing that claim?"

Page 36—Question (By Mr. Roberts): "I think we have reached a point, gentlemen, where this interview should close."

Attorney: "I would like a ruling whether or not we may produce this further evidence?"

Question: (Mr. Roberts): "There will be a time and place set, Mr. Robinson, for that type of evidence."

Exhibit II, Annexed to Affidavit of Earl J. Carroll.

(85) Extract of Transcript of Hearings before Internal Revenue Agents on August 27, 1956, in the Matter of Earl J. Carroll.

Pages 3 to 9—Mr. Carroll: "During the course of two protracted interrogations I have repeatedly asked to be informed as to just what information and substantiation is required of me to affirmatively establish the fact that I have been a bona fide resident in Germany during the period from November 1946 to March 1955 and of Switzerland thereafter. I was advised that the purpose of these interrogations was to enable me to establish this fact. The questions addressed to me during these two interrogations indicate that the true purpose was to elicit information as to earnings from professional services during the period of my residence in Germany, the names of the clients for whom such professional services were rendered and the fees paid for such services.

I have repeatedly maintained that the detailed information sought to be elicited by such questions is information which I am not required to give unless and until it is first determined whether or not such income is reportable and taxable under the provisions of the Internal Revenue Code (Section 116—now section 911), which in turn depends upon whether or not I was a bona fide resident of Germany during the period in question or otherwise exempted from reporting such income under the provisions of section 116 of Title 26, U. S. Code and other sections of Law for the pertinent period involved.

At the conclusion of the last interrogation on August 16th, I again asked to be informed as to what information and substantiation was required in order to enable me to establish affirmatively that I was a bona fide resident of Germany during the pertinent period I was advised

that the following information was essential to the establishment of such a claim of bona fide residence:

1. Books and records of accounts of my professional services in Germany covering this period.

2. Amounts of other fees for cases handled during this period.

3. Details respecting my legal representation of the case of Fredrich Flick including details of stock put up in escrow for the payment of part of a legal fee.

4. Fees received in connection with the Krupp case.

During the recess from the last adjournment date to the continuation of this interrogation today, I have submitted this requested (86) information to counsel and am advised that none of the requested information is relevant to the issue of my claim of bona fide residence in Germany.

In respect to that claim I desire to have the following statement incorporated in the record as part of my testimony in support of this claim of bona fide residence in Germany, in addition to the other testimony already given by me in this respect.

In July 1942, I applied for a commission in the United States Army Air Corps. At that time I was a practicing attorney in San Francisco, California and a member of the California State Bar Association. I also was a qualified aircraft pilot. I was employed by the United States Army Air Corps as a civilian pilot and given a course of training in the Instructor's School at Mather Field, California. In January 1943, I was commissioned as a First Lieutenant in the U. S. Army Air Corps and assigned as a check pilot to Thunderbird Field in Arizona. In September 1943, I was assigned to the 8th Army Air Corps, in

Exhibit II, Annexed to Affidavit of Earl J. Carroll.

England. I remained on active flying duty until the end of the war in Europe. I was transferred to the Judge Advocate Section of the U. S. Army Air Corps, although still on active flying status. In the Spring of 1946, I was assigned to Bad Nauheim, Germany, where I remained until I was returned to the United States for honorable discharge with the rank of Major in September 1946. During the latter part of my military service and while still in Germany, I decided to return to Germany to engage in civilian practice of law for an indefinite period. I returned to Germany as a civilian attorney in November, 1946, and proceeded shortly thereafter to set up an office there to engage in this practice. My knowledge of military law and reputation as a trial lawyer enabled me to secure a number of cases before both military and occupation courts from which I derived sufficient revenue to enable me to establish an office to embark upon a civilian practice in the field of International law.

Among other cases, I undertook the representation of Friedrich Flick and Alfried Krupp. In a quarrel which ensued with the military authorities over my right to represent Alfried Krupp before the U. S. Military Tribunal in Nurnberg, I was forcibly evicted from that trial in early January 1948 and from Germany by order of General Lucius D. Clay, then U. S. Military Governor in Germany. I was residing in Hoechst, Germany, at that time. I left behind a fully equipped office and three employees. Although I made several applications for a re-entry permit, I was not granted one until March 1949, at which time I returned to Germany. I resumed my residence in Frankfurt and reopened my office there. I maintained this office and continuous residence in Germany until March 1955, when I moved to Switzerland where I presently reside. During this period I have visited the United States on four occasions previous to this present visit. The first of these

visits was for a period of six or seven days in March 1952. The second visit was on December 7, 1953 for a period of about one week when I came to Washington. I represented Chief Justice William Clark of the United States Court of Appeals of the Allied High Commission. The third visit of approximately eight or ten days in the latter part of 1954, in connection with a divorce case then pending before a Swiss Court, The fourth visit October 1955 in connection with another case involving issues of International law. On the present visit I arrived in the United States on August 3, 1956 in order to answer a summons served upon me by the Internal Revenue Department on the occasion of my visit in 1955.

During the period of my residence in Germany, I lived in German (87) households, in German hotels, in a seven-room house which I leased on an annual lease basis, furnished. Except for the period of my residence in the leased house, which was in Bad Homburg, just outside of Frankfurt a/m, Germany, I resided in the latter city at all times since my return to Germany in early 1949. In 1947 I resided in an apartment in Hoecht, Germany, a few miles outside of Frankfurt. I maintained a law office at 24 Rheinstrasse in Frankfurt a/m, Germany, from March 1949 to January 1955, when it was removed to 12 Rossmarkt, Frankfurt a/m, Germany.

Transportation costs, meals, accommodations and other expenses were defrayed by me and were procured on the German economy except when dining at a military base as a guest of military personnel. All income for professional services was personal earned income received from sources outside of the United States during the periods of my residence in Germany.

I was admitted to practice before the occupation courts and was a member of the Association of American Attorneys in Germany. I was a member of the Press Club, a

membership based upon the payment of annual dues. I was a member of the American Legion, Frankfurt Branch.

I made many friends among the German people, entered into and became a part of their community, business and social life. During the course of my residence in Germany, I entertained many German nationals and was in turn invited to their homes and entertained by them. I attended social affairs and gatherings on innumerable occasions. I maintained an active practice in the field of international law and had a number of German individuals and firms as clients.

From the time of my return to Germany in November 1946, I resided there with the firm intention of continuing to live there for an indefinite period.

During the entire period of residence in Germany, I traveled freely and extensively about the country. I acquired sufficient knowledge of the German language to carry on both business and social activities, although in connection with legal and technical matters, I employed a competent interpreter.

Mr. Moss stated at the time of my last interrogation on August 16th, on this record, that he had no doubt but that I lived in Germany during the period in question and I am at a loss to understand what more you want. I would suggest you read the following cases:

Meals vs. United States, 110 Fed. Supp. 658;
Fuller vs. Hofferbert, 204 Fed. 2nd 592;
Glackin vs. United States, 110 Fed. Supp. 572.

and a host of other cases dealing with this subject."

I would like the above incorporated in the record because I think it is essential to carrying the burden.

(88) Attorney (Mr. Robinson): "Along the same lines I now offer to prove and make this offer of proof that Mr.

Exhibit II, Annexed to Affidavit of Earl J. Carroll

Carroll was a bona fide resident of Germany from November 1946 to March 1955 engaged in the practice of law and that the professional services which he rendered during that period for which he claimed exemption were personal services performed outside of the United States and for which service he received professional fees from sources outside of the United States. Unless you are satisfied from the investigation you have made and from Mr. Carroll's testimony that Mr. Carroll fell within Section 116, now 911 of the Internal Revenue Code, we are prepared to call a large number of witnesses in support of this offer of proof and I would like to know what procedure you would like to adopt in connection with this. Of course, in some instances we may take affidavits. I have before me one which I would like to offer at this time. I would like to mark it as an exhibit—a former Army officer and attorney in the practice of law in Germany, Arthur Freedman. If it is all right with you we will mark it as Exhibit No. 1. The main problem now is in taking affidavits what procedure would be acceptable to you to follow in connection with establishing the proof which we wish to offer since I understood this proceeding to involve one question, namely the bona fide residence of Mr. Carroll in Germany. Since we have to prove it we may have as many as one hundred or more witnesses. If you have any thought on it we will be glad to discuss it on the record or off unless you are satisfied of your own investigation he was a bona fide resident."

(Affidavit submitted by Attorney)

Exhibit III, Annexed to Affidavit of Earl J. Carroll.

(89)

HODGES, REAVIS, MCGRATH, PANTALEONI & DOWNEY
20 Pine Street
New York 5, N. Y.

October 1, 1956

Matter of Earl J. Carroll
United States Attorney,
Southern District of New York,
United States Court House,
Foley Square,
New York 7, N. Y.

Attention: Mr. Foster Bam

Dear Mr. Bam:

Mr. Carroll informs me that the transcript of hearings previously sent to us by you contains many errors, incorrect statements, and omissions. These are so numerous that it appears that it would be almost impossible to obtain a correct transcript which would fully reflect the hearings without first having a round table discussion between one or more of the Internal Revenue Agents, Mr. Carroll, Mr. Robinson and the reporter, along with her original notes.

When a corrected transcript has been agreed upon and prepared Mr. Carroll will, of course, sign it.

I shall await your advice in the matter.

Thanking you for your courtesies, I am,

Very truly yours,

MARTIN D. JACOBS

Exhibit IV, Annexed to Affidavit of Earl J. Carroll

(90)

THE OPERATION AND FUNCTION OF THE INTERNATIONAL OPERATIONS DIVISION OF THE INTERNAL REVENUE SERVICE

By Edwin L. Kahn

It has been estimated that there are over 500,000 United States citizens living abroad, exclusive of military personnel. A large number of tax payers living abroad, both citizens and aliens, file their returns in Baltimore. However, many citizens maintain their former United States residence, and file their returns in the last internal revenue district in which they resided. Taxpayers living abroad have faced the problem of receiving adequate advice as to their tax problems and consistent treatment by the various district directors' offices, while in turn almost every district director's office has been concerned with securing adequate information for enforcement of the tax laws with respect to these taxpayers as well as taxpayers in the district who do business abroad. The Internal Revenue Service as a whole, of course, is concerned with achieving the proper level of voluntary compliance among all the tax payers living abroad.

In order to solve these and related problems, the Internal Revenue Service concluded that primary responsibility for the administration of its responsibilities abroad should be centralized in an International Operations Division, with headquarters in Washington, D. C. This Division was established on August 22, 1955. Rev. Proc. 55-2, 1955 I.R.B. No. 37, p. 105. It is anticipated that in the course of time this Division will probably act, in effect, as a district director's office for all areas outside the United States. Progress in this direction is expected to be made slowly and after full evaluation of the results of each step. At

present, the Division has audit and collection authority, and all tax returns having foreign addresses are forwarded to it from the various internal revenue districts, including Baltimore. However, taxpayers will be required to continue to file their returns in the appropriate internal revenue district until specific changes in filing requirements are promulgated by the Service.

Insofar as is feasible, the audit of returns and similar work involving overseas taxpayers is handled by correspondence. However, annually, during the filing period, the Division assigns agents to various foreign countries not only to assist taxpayers with their tax returns and problems, but also to confer with taxpayers in matters requiring personal contact. See, for example, the announcement in 1956 I.R.B. No. 7, p. 60. In addition, it now has four permanent foreign posts of duty. Supervision of the Office of the Treasury Representative (Taxation) in Paris was transferred to the Division in Rev. Proc. 55-2, supra, which established the Division. In February, 1956, the Division established similar posts of duty in Ottawa, Frankfurt, and Manila. Additional permanent foreign posts of duty may be opened from time to time. The Division's representatives in these posts of duty are available for consultation and advice to taxpayers located in the foreign area served by the post of duty. However, it is desired that communications from United States sources for information and advice be addressed to the Washington headquarters of the Division rather than to the foreign posts.

The Alien Returns Section, formerly in the Baltimore district, has been transferred to the new Division. Present plans provide that on July 1, 1956, there will be transferred to the new Division the areas of Puerto Rico and the Virgin Islands (from the Lower Manhattan district) and the Canal Zone (from the Jacksonville district). How-

ever, as stated above, there will be no change in the place of filing returns and paying tax until a specific announcement is made.

The division was created as a part of the Baltimore district, but was transferred to the National Office of the Revenue Service on May 1, 1956. The Director of International Operations reports to the Assistant Commissioner for Operations.

The new Division must be distinguished from the International Tax Relations Division in the National Office. The latter Division represents the International Revenue Service in the negotiation and development of tax treaties (conventions) with foreign governments, and assists in the interpretation of these treaties and of foreign law. On the other hand, the International Operations Division is concerned primarily with the operating problems (audit, collection, taxpayers' assistance, etc.) involving the administration of the United States tax laws (including tax treaties insofar as they affect operations) in areas outside the United States.

Affidavit of Donald Doane, in Support of Motion to Vacate Ex Parte Order, etc.

(92)

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss.:

DONALD DOANE being duly sworn deposes and says that he is an associate editor for U. S. News and World Report, having become so engaged since October 1953. Prior to that time, your deponent was a foreign correspondent for the Associated Press in England and Germany. Your deponent first met Mr. Earl J. Carroll in London, England, on or about the month of December, 1945. At that time

Mr. Carroll was a Captain in the U. S. Army Air Corps, engaged as a prosecutor on behalf of the United States Army in the so-called "Litchfield Trials". I was covering the trials for my press service and it was in this way that we first became acquainted.

In the spring of 1946 Mr. Carroll was transferred to Bad Nauheim, Germany, where I was assigned and where I again had occasion to see Mr. Carroll almost daily until he departed for the United States in September 1946 to be separated from military service. Before he departed, he had stated to me several times that he liked living in Germany, and that he intended to return to Germany to establish a law practice there. His name and reputation as a lawyer was good. I would say that his name was well known to all Americans in Frankfurt, Germany at the time, both military and civilian, and to many German nationals as well.

In or about the month of November, 1946, Mr. Carroll returned to Germany and established his home and office in Hoechst, (93) Germany. I reported on a number of his cases, and we were in friendly contact with one another frequently. He remained in Germany until ordered out by General Clay in January, 1948, at which time he expressed to me and others his determination to appeal from General Clay's order and to return to Germany to resume his law practice and residence in Germany at the earliest possible date.

In March of 1949, he returned. I reported on a number of his cases and his activities from then until I returned to the United States in September, 1953. During that four year period, Mr. Carroll lived in Frankfurt and in Bad Homberg, Germany, he maintained his office at 24 Rheinstrasse, Frankfurt, Germany; he mixed and engaged in social activities with both Germans and Americans; he was a member of the Frankfurt Press Club of which I

was President in 1949 and Vice President in 1950 and 1951, and a member thereafter; he owned and operated several automobiles; he had two large dogs at his home in Bad Homberg where he resided for two or three years.

Many times during this period of years at the Frankfurt Press Club, which was the communal center for many Americans residing in Frankfurt and in other places he spoke of remaining in Germany indefinitely because he liked it there.

Mr. Carroll knew all the newspaper people, as well as the business men, lawyers and other Americans who were residing in Frankfurt, Germany at the time. From my observation of him and his activities and on the basis of statements made by him and by others about him, I would say without equivocation that he was a resident of Germany during the years to which reference is hereinabove made. He still resided there when I returned to the United States in September, 1953 after having worked overseas for the Associated Press for almost nine years. I knew him for about eight years of my nine years overseas employment. I and (94) my friends always regarded Mr. Carroll as a fellow resident of the Frankfurt community. We visited his home repeatedly over a period of years, and he in turn visited ours. I know that he lived and worked in Germany, and I am at a loss to understand how anyone can assert the contrary.

(Sworn to by Donald P. Doane on
September 26, 1956.)

Affidavit of Michael Rothkrug, in Support of Motion to Vacate Ex Parte Order, etc.

(95)

City of New York
County of New York } ss.:

Michael Rothkrug, being duly sworn, deposes and says that he is a citizen of the United States and resides at Westport, Connecticut; that he was in the Military Service of the United States from March, 1942 to May, 1946; that he was stationed in England and Germany from June, 1943 to early 1946 at which time he was returned to the United States for Honorable discharge.

While in Europe, your deponent first heard of Mr. Earl J. Carroll, then a Captain in the U. S. Army Air Corps, in connection with his prosecution of the widely publicized "Litchfield" Court Martial Trial conducted in England in late 1945 or early 1946.

After return to civilian status, your deponent was employed by the United States Government as an investigator in the Military Intelligence Section Frankfurt, Germany. He remained in Frankfurt until his transfer to Berlin in about June, 1947. From that time to approximately May, 1952, your deponent was engaged as Chief of the Document Section, Military intelligence, in the City of Berlin. After terminating his employment with the government in May, 1952, your deponent remained in Germany as a private citizen.

During the time, your deponent was in Germany, first in Military Service and later in a civilian status, he read many press accounts and heard many radio broadcasts, concerning the (96) activities of Mr. Carroll in Germany. Practically all of them were in connection with legal matters in which Mr. Carroll was active.

In December, 1952, your deponent retained Mr. Carroll as his attorney. On many occasions thereafter, he visited

Mr. Carroll at his home in Bad Homberg, and at his office in 24 Rheinstrasse, Frankfurt. Your deponent knows of his own personal knowledge that Mr. Carroll took part in the general communal life of Frankfurt and its vicinity; had many friends, both American and German nationals; engaged actively in law practice in Germany, and expressed on many occasions satisfaction with his life and home in Germany and his intention to remain there.

Although Mr. Carroll spoke German sufficient for his ordinary daily affairs, on occasions he utilized the services of your deponent as interpreter particularly when dealing with German officials in cases where more technical language was required. This was particularly true in a number of cases wherein Mr. Carroll sought the release of American citizens held in German Jails. In most of these cases, as far as your deponent knows, his services were without compensation. Mr. Carroll repeatedly clashed with the State Department for not taking a stronger stand in the matter of the German authorities imprisoning American citizens on minor charges and holding them without bail. Several of these clashes were widely publicized. Mr. Carroll was well known and much admired by most of the Americans in Germany, both civilian and military, except those few government officials with whom he had difficulty because of his continuous fight to protect the rights of American citizens in Germany.

There can be no question in anybody's mind, but that Mr. Carroll made Germany his home, his place of business, and (97) his life during the period herein referred to, and I am willing to testify under oath at any time to the facts hereinabove set forth.

(Sworn to by Michael Rothkrug on September 28, 1956.)

Affidavit of Gertraud Kunz, in Support of Motion to Vacate Ex Parte Order, etc.

(98) GERTRAUD KUNZ, being duly sworn, deposes and says:

1. I am a German National and have been secretary to Mr. Earl J. Carroll from 15 July 1953 to on or about March 1955 inclusive.

2. During this period of time Mr. Carroll maintained an office for the practice of law at 24 Rheinstrasse, Frankfurt/M, Germany.

3. On or about January 1, 1955, the office was moved to 12 Rossmarkt, Frankfurt/M, Germany. At about this time Mr. Arthur Freedman also came into the office and on about March 1955 Mr. Freedman took over the office completely. About that time Mr. Carroll changed his residence from Frankfurt, Germany, to Switzerland.

4. When I first came into Mr. Carroll's employ, the office appeared to have been established for a long time prior thereto. The files and records dated back to 1946 and 1947. Mr. Carroll's legal practice in Germany was well known and publicized. I read of many interesting cases in which he was engaged in Germany as far back as 1947.

5. I came to Frankfurt from Berlin in 1951. Shortly thereafter I worked for a business man in Frankfurt who was a client of Mr. Carroll's. I frequently saw Mr. Carroll in my employer's office. Mr. Carroll resided in Frankfurt and its vicinity. I know this of my own personal knowledge from the time I went to work for him as his secretary. I also had occasion to see the lease agreement under which he leased a house in Bad Homburg and the receipt for pay-

ment of both the rental and (99) expenses of maintaining that house covering a period of several years. I paid the monthly salary of the housekeeper from funds provided by Mr. Carroll. I also saw a record of many bills for office, household, and other expenses—all covering the continuous period from 1949 to March 1955. Most of those dated after I was engaged as his secretary were paid by me from funds which he supplied.

6. I know Miss Iris Hoesel who was Mr. Carroll's secretary prior to my employment by him. She is now married. Miss Hoesel worked for Mr. Carroll as his secretary in Germany continuously from 1949-1950 to the time I replaced her in 1953.

7. Miss Hoesel left Mr. Carroll's employ to become the private secretary of Mr. Alfried Krupp von Bohlen und Halbach of the firm of Krupp in Essen, Germany. She told me that Mr. Krupp had asked her to bring certain records and accounts concerning the Krupp matters handled by Mr. Carroll. These were considered confidential matters. The considerable quantity of books, records, files and papers were packed and shipped either to the Krupp office in Essen or to a German attorney handling their affairs.

8. After the departure of Miss Hoesel, I had access to all of the books, records and files in Mr. Carroll's office. I am certain that I examined most of them. I did not see any books or records of accounts or any papers containing any such records concerning Krupp matters among the records left in the office.

9. All of the records and files in Mr. Carroll's office at 24 Rheinstrasse were transferred to the office at 12 Rossmarkt in January 1955.

Affidavit of Gertraud Kunz.

10. About the middle of June 1956 I was instructed by Mr. Freedman to ship certain records remaining in the office together with all office furniture and equipment to Mr. Carroll in Switzerland. This was done.

(100) 11. During the time that I worked for Mr. Carroll, he had several large dogs that he kept at his house at Bad Homburg. He also owned two horses that he kept stabled in the outskirts of Frankfurt which he rode several times each week. He had many German friends whom he entertained quite often and in turn was entertained by them.

12. Although there were many American civilians in Frankfurt who lived on the United States Military economy, Mr. Carroll lived entirely on the Germany economy.

13. In July 1956 Mr. Carroll asked me to arrange for a visa to visit the United States for the purpose of appearing as a witness for him to testify as to my knowledge of his residence and legal practice in Germany and as to my knowledge of his office records. The United States Department delayed the issuance of my visa until the end of August. Mr. Carroll had previously arranged for my transportation here.

14. I arrived in the United States on September 2, 1956, and went to see Mr. Carroll in Palm Beach, Florida, where he was temporarily visiting. He informed me that the Internal Revenue agent had refused to take my testimony. He asked me to remain here until it could be determined whether or not there would be an opportunity for me to testify as to my knowledge of his residence in Germany and his legal practice there during the period that I was engaged as his secretary and to such other matters as might be in my knowledge.

(Sworn to by Gertraud Kunz on September 25, 1956.)

Affidavit of Arthur Freedman, in Support of Motion to Vacate Ex Parte Order, etc.

(101)

STATE OF FLORIDA }
COUNTY OF DADE } ss.:

PERSONALLY APPEARED before me, the undersigned authority, duly authorized to administer oaths and take acknowledgments, ARTHUR FREEDMAN, who, after being first duly sworn and cautioned, deposes and says:

That I am a practicing attorney, duly admitted to the practice of law in the State of Florida, and am a member of the firm of Dunn, Freedman & Haft, with offices at 513 Ainsley Building, Miami, Dade County, Florida.

That during my tour of duty as a pilot in the United States Army Air Corps, and while stationed in England and France during the years 1944 and 1945, I became acquainted with Earl J. Carroll, then an officer in the United States Army Air Corps.

That about April, 1949, I returned to Germany on a tour of active duty as an officer with the United States Air Forces; I was stationed at Weisbaden and Frankfurt, Germany until January, 1950; during this period I renewed my acquaintance with Earl J. Carroll, who was practicing law as a civilian attorney in Frankfurt, Germany at that time; his offices were located at 24 Rheinstrasse, Frankfurt a/m, Germany.

That I returned to Germany on a further tour of duty with the United States Army Air Forces about July, 1951, and served as an officer stationed at Frankfurt a/m, Germany until the end of July, 1953, when I was discharged there and remained to practice law as a civilian attorney until July 25, 1956.

That during the entire period of my stay in Germany, I had the occasion to converse with and observe Earl J.

(102) Carroll; he was engaged in a general practice of law; his clients included both nationals of the United States and Germany, and other countries; he was engaged principally in the practice of international law, although he also tried a goodly number of cases before United States and Allied military and occupation tribunals; we were close friends and on many occasions Mr. Carroll was a guest in my house and on many occasions, myself, my wife and children were his guests at his home; Mr. Carroll resided at several different places during this period, all of which were on the German economy and at his own expense, including a house which he had leased; on many occasions I discussed with him the length of his proposed stay in Germany and on each of these occasions, prior to the middle of 1953, he told me that he intended to remain there to engage in the practice of international law; sometime in 1955, he told me that he intended to continue his practice of international law in Switzerland; that subsequently, at his request, I shipped his office furniture and equipment from Frankfurt to Neuchatel, Switzerland.

That during the period of Mr. Carroll's residence in Germany, he lived in the same manner as any German resident, paying all of his own living and business expenses; he mixed with the social and economic life of Germany; he had many German friends, attended their social and economic functions and generally participated in the life of the community with other German residents; he owned and operated several automobiles; he engaged in the sporting activities of the German community; he owned several horses which he stabled and used in Frankfurt and its vicinity; he belonged to a number of organizations, including the Frankfurt Press Club, Association of American Lawyers in Europe, American Legion, Frankfurt Post; his name was listed in the Frankfurt, German civil telephone directory; he entertained and was enter-

tained by numerous German nationals; that during this period, Mr. Carroll made a few short visits to the United States, but continued to maintain his residence in Germany.

(103) That during this entire period, Mr. Carroll was a bona fide resident of Germany in every sense of the meaning of that term.

FURTHER deponent sayeth not.

(Sworn to by Arthur Freedman on August 24, 1956.)

Affidavit of Bernard V. Roberts, in Opposition to Motion to Vacate Ex Parte Order, etc.

(104)

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

BERNARD V. ROBERTS, being duly sworn, deposes and says:

1. I am the Coordinator of Special Investigations, International Operations Division, Internal Revenue Service, United States Treasury Department, Washington, D. C., and as such have charge of the examination of the income tax liability of EARL J. CARROLL.

2. I was present during the taking of a statement from EARL J. CARROLL given in New York City on August 16 and 27, 1956, and have read the transcript of the same, and aside from customary typographical errors contained therein, not material to the issues involved, believe the

transcript to be an accurate recording of MR. EARL CARROLL's testimony.

3. I and other agents of the Internal Revenue Service have examined MR. CARROLL's income both domestic and foreign as best we can and his tax returns for the years in question show no income from foreign sources.

4. He has admitted that he has received income from foreign sources on which no tax has been paid and we believe this income is taxable.

5. In addition, he has admitted receiving fees from foreign payors for services rendered partly within the U. S. He failed to report or disclose such fees in his tax returns, and refused to disclose to us the amount of such fees in order that we might correctly determine their taxability.

6. It is necessary in order that we may prepare an accurate statement of MR. CARROLL's income and tax liability that we have access to books and records that he may have, and testimony concerning his income from foreign sources. MR. CARROLL has stated that during the years 1947 to 1954, inclusive, (105) he was a bona-fide resident of a foreign country engaged in the practice of International Law, when in fact his practice of law in foreign countries, according to available information, was limited to courts martial, military occupation, and similar cases involving, directly or indirectly, the United States or its Allies in occupied countries. MR. CARROLL has offered no conclusive proof that he was engaged in the practice of international law. We believe it essential to our determination as to whether or not MR. CARROLL was a bona-fide resident of a foreign country or countries for the years 1947 to 1954, inclusive, that we have his books

and records offered in corroboration of his statement with respect to his alleged practice of international law. We have reasonable grounds to believe and do believe that MR. CARROLL was not a bona-fide resident of a foreign country or countries during the years in question within the meaning of the Internal Revenue Code, and that he has substantially understated his income upon which he is liable for back taxes.

7. It is necessary and essential that the books, records and testimony called for in the summons be produced so that an acurate computation of MR. CARROLL's income and tax thereon can be made.

8. Although I have been advised by Assistant United States Attorney Foster Bam that I need not particularize the material and relevant facts indicating that MR. CARROLL was not within the meaning of the Internal Revenue Code a bona-fide resident of a foreign country during the years in question, we know upon good and reliable information that he in 1952 and 1953, upon returning to the United States, described himself under oath to a government agency as being a returning resident of the United States. The above-cited instance constitutes only a minor part of the facts on which we base our conclusion that MR. CARROLL was not a bona-fide resident of a foreign country or countries during the period in question.

(Sworn to by Bernard V. Roberts
on October 10, 1956.)

Reply Affidavit of Earl J. Carroll, in Support of Motion to Vacate Ex Parte Order, etc.

(108)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

EARL J. CARROLL being duly sworn deposes and states in reply:

The affidavit of Bernard V. Roberts dated October 10, 1956, the only opposition document submitted to this court, speaks eloquently by its silence. Although Mr. Roberts infers that the basis for his "belief" and "conclusions" is a secret investigation which the Internal Revenue Agents made, he does not deny any of the facts set forth in my affidavit of October 5, 1956.

He does not deny that he foreclosed me from proving bona fide foreign residence by the competent and material testimony of witnesses and that my own testimony on the subject was disregarded.

He does not deny that the Internal Revenue Service seeks to arbitrarily assess me without granting me an opportunity to establish that I fell within the purview of Section 116(a) as alleged in the moving papers.

He does not deny that a complete open investigation was conducted by Internal Revenue Agents in Germany; that I was fully interrogated there and that those agents agreed that my foreign income was not reportable or taxable as I swore in my affidavit of October 5, 1956.

He does not deny that I had not returned to the United States from 1946 when I first established residence in Germany (109). to January 1948 when I was expelled pursuant to General Clay's order and he does not deny that I was not in the United States, after I was permitted to return to Germany in early 1949, for over three years from March, 1949, to April, 1952.

He does not deny that during the next three years, 1952, 1953 and 1954, I made but three short trips to the United States, each in connection with a specific matter and that on those occasions I stayed in hotels for a few days and did not go to California where I resided before the outbreak of World War II.

He does not deny that the Internal Revenue Agents, including himself, when conducting the Hearings in August, 1956, were not seeking information respecting my bona fide residence, as alleged in my affidavit of October 5, 1956, but seeking only information on which to base an assessment despite my status under Section 116(a).

He does not deny that he and his associate agents have disregarded the findings and conclusions of Internal Revenue Agents who investigated in Frankfurt during the time of my residence there and who had firsthand knowledge of the facts.

He does not deny that I maintained a law office in Frankfurt and engaged in the general practice of the law there. On this subject he says that it is his "belief" that my practice was limited to Court Martial trials and Military Occupation matters. Just what this has to do with the issue, I am at a loss to understand. His belief, in any event, is untrue and unfounded, but even assuming that it were true, I can find nothing in the statutes which states that one cannot be a bona fide resident of a foreign country if he engages in the trial of Court Martial cases or conducts his practice in connection with occupation matters.

He denies my claim that the transcript of the hearings is not accurate, but says that any inaccuracies consist merely of (110) typographical errors. He would infer that in the specific instance where he himself changed his statement to indicate the direct contrary of what was recorded, that same was only a typographical error. Record-

ing the wrong words is to him only typographical. The fact is that the record is replete with errors and omissions, his "belief" to the contrary notwithstanding.

Strange indeed is the fact that Mr. Roberts does not deny or take issue with my direct charge that his affidavit of August 22, 1956, submitted in support of the ex parte order was incorrect and false. Despite that charge, he does not attempt to establish the contrary and does not point out to this court the source upon which he predicated those false statements. It was he who misled the Federal Judge to whom the application for the ex parte order was submitted and now remains silent on the subject.

Only one conclusion can be drawn from the failure of the Internal Revenue Service to controvert what I stated in my affidavit of October 5, 1956 respecting my bona fide foreign residence, and that is that the facts therein alleged are wholly true and cannot be controverted.

Mr. Roberts' affidavit, unsupported by facts, but based upon his alleged "beliefs" and his "conclusions" makes several allegations which may not go unnoticed. He says that I "admitted receiving fees from foreign payors for services rendered partly on the United States". This statement is in the plural, but such is not the actual fact. Only one client was so involved and the amount of service performed for him in the United States was infinitesimal and performed without fee.

The facts are these: Flick, a German industrialist engaged me in Germany in the year 1947 when I was living and conducting my law practice there. My employment was for services (111) in Germany. I gathered evidence and researched legal problems respecting the filing of a writ of habeas corpus on his behalf. The law which I found pointed to the District Court in Washington as the appropriate tribunal. Other counsel were employed to

handle the United States aspects. I had no intention of coming to the United States in connection with this or any other matter. In January, 1948, General Clay evicted me from Germany. I had to come to the United States and, of course, I discussed the case with the attorneys who were to handle the United States aspects. During my forced stay in the United States, the application for the writ was argued in the District Court by Mr. Foley, an American lawyer, now a Judge in the State of California. The Appeal was argued by another American lawyer. I was physically present at both hearings which totaled less than 1½ hours—an infinitesimal fraction of the months and years I performed services for this client in Germany. Fees for the performance of the work in the United States was paid these American lawyers and others who took part therein. My recollection is that I did not participate in the argument in the lower court at all and that on Appeal I participated only to the extent that some technical questions involving occupational legislation were raised. This does not constitute rendition of services within the United States, but assuming it was, then it is governed by treasury regulations 118, 39.116-1; 39-111(c)-1; 39.119(a)-3.

These regulations provide that any necessary apportionment shall be on a "time basis"—that is, on the basis that the time consumed in the United States bears to the time consumed in the performance of the services outside the United States. Obviously, an insignificant sum is involved—an amount which would not equal the expenses incurred in going to Washington. The authorities seem to hold, however, that if a bona fide foreign resident returns to the United States for consultations with business associates or to report to his superior or for similar (112) matters that same does not constitute rendition of services in the United States. (Seeley v. Com. of Internal Revenue, 186 Fed. 2nd 541.) It is to be noted, however,

that no part of the Flick fee, which was paid to me, was for these two visits to the Washington Court or for my personal conferences with the other attorneys in the United States. No other instance of alleged performance of service in the United States exists, nor were any mentioned despite Mr. Roberts plural reference.

Mr. Roberts states in his October 10th affidavit, "Mr. Carroll has offered no conclusive proof that he was engaged in the practice of international law. We believe it essential to our determination (of bona fide residence) that we have his books and records offered in corroboration . . . We have reasonable grounds to believe and do believe that Mr. Carroll was not a bona fide resident of a foreign country . . ." It is difficult to know just what Mr. Roberts is trying to convey to the court. Certainly the type of law practice would have no bearing on the question of residence.

On the one hand, he says that to determine bona fide foreign residence he must have records showing corroboration of an international law practice. On the other hand, he says that he does not believe that Mr. Carroll was a bona fide foreign resident. The last paragraph of his affidavit states that the "conclusion" has been reached that Mr. Carroll was not a bona fide foreign resident. If such is the conclusion, why then should the matter be gone into further unless Mr. Roberts is trifling with this court when he says that records are required in "corroboration" to establish my bona fide foreign residence. His fixed "beliefs" and "conclusions" that I was not such a resident cannot be reconciled with his request for corroborative evidence in support of bona fide residence, particularly since he has (113) already taken the position that he would accept no further evidence on the subject. A specific offer of proof was made on the record (See Transcript 8/27/56

pages 8 to 20), but I was denied the right to introduce such proof.

It should be pointed out to this court that international law occupies much the same place in the lives of the people of European nations as does Federal law among the people of our several states. It was on this concept that the quadrupite occupation of Germany was predicated. Much of my practice involved questions relating to the conflict of laws and the rights of individuals and enforcement of those rights under various sovereignties. Whether I advised or acted in a case involving an East Zone displaced person who found himself in difficulty in the British occupied area or whether I was involved with a case of an American soldier who had to be extradited from Switzerland to stand trial before a Military Court, or whether I was engaged in protecting a German national from the unlawful seizure of his property by an occupying power, seems of little consequence to the determination of the real issue, i.e., my bona fide residence in the area during the period in question.

Mr. Roberts would convey the impression, in the last paragraph of his affidavit, that he was conducting a Communist spy hunt wherein he must maintain strict secrecy and he would like this court to be governed by his "beliefs" and "conclusions" without revealing any facts or the basis for such "beliefs" and "conclusions". Maybe he has secret informers or possibly his conclusion and belief was taken from thin air. Regardless, however, what anyone says, no informer or Internal Revenue Agent or other person residing here or abroad can state under oath and upon knowledge not upon illusory "beliefs", that I did not reside in Germany for nine long years with the exception of the time that I was forcefully evicted.

(114) Mr. Roberts appears willing to let this court have

a small inkling of the basis of his belief. He states that he has it "upon reliable information" that upon returning to the United States in 1952 and in 1953, I described myself "under oath to a Government agency as being a returning resident of the United States". Of course, no affidavit by the alleged Government agent is produced, nor is any document relative to this matter produced. I pointed out in my affidavit of October 5th that I returned to the United States for a few days in 1952 to appear before the Board of Military Appeals in Washington which appearance was made without fee and under an agreement with the client to pay expenses of the trip. The second visit for a few days in 1953 was made on behalf of Honorable William Clark, Chief Justice of the United States Court of Appeals of the Allied High Commission. This mission was undertaken without fee and at my own expense. On neither of these occasions did I make any oath to any government agency on any subject. If Mr. Roberts is referring to the printed form of Customs Declaration which is filled out on the airplane and handed to the airline stewardess, then he is certainly making a mountain out of a molehill and in addition, points up to this court the thin thread on which the government relies for its "belief" and "conclusion" that I was not a bona fide resident in Europe even though I lived there for nine years.

I do not recall the language of the printed forms of Customs Declarations. They may contain a statement about residence, which in my understanding and as I was told by the Customs Inspector refers to permanent residence or domicile in the United States similar to that which appears in one's passport. Bona fide foreign residence does not necessarily preclude permanent residence or domicile in the United States. Commissioner of Int. Rev. v. Swent, 155 Fed. 2nd 513; Fuller v. Hofferbert, 204 Fed. 2nd 592;

Meyers v. Commissioner of Int. Rev., 180 Fed. 2nd 969. In any event, (115) I gave little heed to the matter as I had nothing to declare and did not declare anything. I had with me on the occasions of those two short trips to the United States after years of absence, a small suitcase containing an extra suit, a few shirts and other items of wear sufficient for a stay of four or five days.

The affidavit of Mr. Roberts dated October 10, 1956, unsupported by facts and based only upon "beliefs" and "conclusions" indicates all the more my need for appropriate protection and relief by this court. The Courts are not, as was said in Local 174 v. United States, 56-1 USTC #9136, merely rubber stamps to place the imprimatur of approval on administrative subpoenas. It is the Court which must be satisfied upon a judicial hearing, that the action of the Internal Revenue Agent is authorized by law and the burden is on them to so establish. Surely Mr. Roberts has failed so to do.

It is accordingly respectfully requested that the application for the relief herein requested be granted.

(Sworn to by Earl J. Carroll on October 15, 1956.)

Opinion.

(116) EDELSTEIN, D. J.:

This is a motion to vacate an ex parte order directing respondent, in effect, to obey an Internal Revenue Service summons that had been previously served on him. Section 7601 of the Internal Revenue Code of 1954 authorizes the Secretary of the Treasury or his delegate to inquire after all persons who may be liable to pay an internal revenue tax, and Section 7602 provides for the examination of books and records and the taking of testimony which may be relevant or material to such inquiry. The analogous section of the 1939 Code, Section 3614, provided for the examination of books and the taking of testimony "bearing upon the matters required to be included in the return", but the phrasing of Section 7602 of the 1954 Code, in terms of data and (117) testimony which "may be relevant or material" to the inquiry constitutes no material change from the prior law. Senate Committee Report No. 1622, p. 617. Section 7605(b) requires that no taxpayer shall be subjected to unnecessary examination or investigations. The examination of the respondent, who claims to have been, in the years under investigation, a bona fide resident of Germany whose income derived from the practice of international law, is directed not only to his general liability for taxes but also to the specific amounts payable. Respondent refused to answer questions or furnish data that he considers to bear upon the amount of tax payable, consenting only to submit to examination on his status as a bona fide resident of Germany. Any other examination, he contends, is unnecessary and not relevant or material to the inquiry, or "bearing upon the matters required to be included in the return", because under Section 116 of the 1939 Code, his income for the years in question was not reportable or taxable, being earned income of a bona fide foreign resident.

Opinion.

The pleadings which frame the issue for decision are the application for enforcement of the summons, consisting of two affidavits, the motion to vacate the ex parte order and the affidavit in opposition. The (118) application for the ex parte order is treated as a complaint, and under Rule 8(8) of the Federal Rules of Civil Procedure it is necessary for the complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Martin* v. *Chandis Securities Co.*, (9 Cir.) 128 F. 2d 731. From the "complaint" it appears that the respondent was subpoenaed to appear before an officer of the Internal Revenue Service; that he declined to answer certain questions relating to the contractual and financial terms between himself and certain persons during the years 1944 and 1954; that he declined to furnish any information concerning other income earned in Germany or other foreign countries during the years 1944 to 1954 inclusive; and that he failed to produce for examination the books, records and papers required by the subpoena. Without more, it is apparent from the face of the complaint that the information sought is relevant to the inquiry concerning persons who may be liable to pay an internal revenue tax, or that it bears upon matters required to be included in a return, and by the very nature of the information required it does not appear to be unnecessary. Thus, the complaint does not fail to state a claim for relief.

(119) Respondent attempts to raise the issues of relevance and necessity by the allegations of fact in his motion to vacate. He sets forth at length facts to indicate that, during the years in question, his income consisted of fees earned as an international lawyer while he was a bona fide resident of Germany, thus qualifying him from exemption from the filing of a return and the payment of taxes under Section 116 of the 1939 Code. If he is not

required to file a return for those years, an inquiry into the details of his income cannot be relevant or necessary. Therefore, he argues, the only inquiry presently proper is on the issue of his foreign residence.

Apparently he demands some sort of a threshold determination of the issue, but it is not at all clear how such a determination is to be achieved. The contention that the Internal Revenue Service is required to permit him to establish his bona fide foreign residence at the inquiry is without merit. The inquiry is strictly inquisitorial and not a judicial proceeding where rights are finally determined. *In re Albert Lindley Lee Memorial Hospital* (2 Cir.), 209 F. 2d 122; *Matter of Sidney S. Levine*, 1956 P-H Fed. Tax Service, Par. 72,535 (S.D.N.Y., 1956, not officially reported), affirmed on the opinion of Judge Kaufman, 1956 P-H Fed. Tax (120) Service Par. 71,092 (2 Cir., 1956, not officially reported). The power vested in the Secretary is similar to the power vested in federal grand juries. *Falsone* v. *United States*, (5 Cir.), 205 F. 2d 734. A grand jury is not required to hear and decide the defenses of a prospective defendant.

Nor does this court have the power at this time to decide the issue of foreign residence so as to determine the coverage of the defendant by the internal revenue Laws. Cf., *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501; *Okla. Press Pub. Co.* v. *Walling*, 327 U. S. 186. Congress has conferred upon the Secretary the power and duty to administer the internal revenue laws, including the law relating to the exemption from taxation of foreign residents, and it has provided a method of inquiry for effectuating that purpose. The eventual decision of whether or not an assessment shall be made is one for the appropriate administrative authority, not for the court; to decide the issue of coverage now might preclude an inquiry by the administrative authority and disable it from carry-

ing out its prescribed function. The issue of bona fide foregn residence may, in due course, reach the court in a suit for a refund, but the court may not short circuit the procedure by usurping the administrative function.

(121) The statute of limitations cases relied upon by the respondent are consistent with this conclusion. In *Martin* v. *Chandis Securities* Co., (9 Cir.) 128 F. 2d 731, the complaint indicated on its face that inquiry was sought into years for which the statute of limitations had run, and there was no allegation that the return was false or fraudulent so that limitation would not apply. The case is simply one where the complaint failed to state a claim for relief. It by no means stands for the proposition that the court must make an initial determination of coverage. On the contrary, where the statute of limitations is involved on the face of the complaint, an inquiry may be required upon merely a conclusory allegation of suspicion of a false and fraudulent tax return, without even the necessity of the proof of facts showing reasonable grounds to believe the return to be fraudulent. *United States* v. *United Distillers Products Corp.*, (2 Cir.) 156 F. 2d 872; *In re Wood*, 123 F. Supp. 297, and 130 F. Supp. 121. In *Falsone* v. *United States*, (5 Cir.) 205 F. 2d 734, it appeared that the statute of limitations had run against the returns for certain years, but an inquiry into those years was permitted on an allegation that it was necessary to a so-called net worth case involving more recent years. Thus, even if there appeared on the face of the application for the ex parte order, in (122) the case at bar, facts indicating that the respondent was a bona fide foreign resident during the years in question, an allegation that the Internal Revenue Service agents have reasonable grounds to believe and do believe that the respondent was not a bona fide resident of a foreign country during those years, within the meaning of the Internal Revenue Code, would

suffice to sustain the order. Inasmuch as the facts are alleged in the motion to vacate, the allegation of belief set forth in the affidavit in opposition suffices, and no further showing is required.

Other cases cited by the respondent are merely those where the showing made by the Government clearly indicated a lack of relevance or necessity. The burden of establishing that the information sought was actually needed and necessary was not met where the examination was for the purpose of aiding the Government in defense of a lawsuit, in lieu of an examination before trial, *Pacific Mills* v. *Kenefick*, (1 Cir.) 99 F. 2d 188; or for the purpose of procuring evidence that might be material in verification of the tax return of some other person than the one examined, not known to the Bureau of Internal Revenue, and who may or may not have made a return, *McDonough* v. *Lambert* (1 Cir.), 94 F. 2d 839; *Mays* v. *Davis*, 7 F. Supp. 596; *In re International Corporation* 5 F. Supp. 608. But where, as here, the (123) Internal Revenue Service agents state that they have made an investigation, that they have reasons to believe taxes are owing, and that the data sought are necessary to the completion of their inquiry, the burden of showing necessity is met.

The Government has no burden of showing probable cause to justify its inquiry by summons. Only where a third party is requested to produce records relating to a taxpayer under investigation is there a requirement for the Government to establish that the benefit it will derive from the data sought bears a reasonable relation to the burden placed on the respondent. *First Nat. Bank of Mobile* v. *United States*, (5 Cir.) 160 F. 2d 532; *United States* v. *Third Northwestern Nat. Bank*, 102 F. Supp. 879; *Matter of Sidney S. Levine*, supra. A requirement of a prior showing or determination of tax liability would defeat the purpose of Section 7601, which authorizes inquiry after persons "who may be liable to pay any internal

revenue tax". A taxpayer may not refuse to disclose the details of his income because he believes that the income is not taxable, and thereby frustrate an inquiry by requiring proof to the contrary in advance.

In any event, it does not appear that the issue of general tax liability is insulated from the details of the respondent's income. Only earned income is (124) exempt under Section 116 of the 1939 Code, and the Government is entitled to inquire into the income source. If, as has been indicated, respondent received fees in property rather than in cash, any gain realized from that property would not be earned income, under the definition of Section 116. Furthermore, it appears that some part of the fees he received was for work done in the United States, and compensation for such work is taxable. Finally, the Government contends that the details of his income are necessary to decide the residence question on the ground that such items as the amount of taxes paid to the German Government and the ratio of military to non-military cases handled by respondent abroad are relevant to the issue. He denies the relevance of such information to the question of residence; but the determination of relevancy "is a burden and responsibility which the proposed witness should not assume." *Stone* v. *Frandle*, 89 F. Supp. 222, 224. "Obviously, the taxpayer cannot be the judge of what books and papers are relevant and material, and thus restrict the examination of his financial affairs to papers of his own selection. A determination of the matter, in the first instance at least, is for the Commissioner, who is charged with the duty of verifying (125) the correctness of the taxpayer's returns." *In re International Corporation Co.*, 5 F. Supp. 608, 611.

Accordingly, the motion to vacate will be denied.

Dated: January 2nd 1957.

DAVID J. EDELSTEIN,
United States District Judge.

Notice of Appeal to Court of Appeals Under Rule 73(b).

(116) Notice is hereby given that Earl J. Carroll, above named defendant, hereby appeals to the Court of Appeals for the Second Circuit, from the decision of the Honorable David W. Edelstein, refusing to vacate an ex parte order which requires defendant to obey an Internal Revenue Summons, entered in this action on January 2, 1957.

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To:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 379

In the Matter of the Application
of
EARL J. CARROLL, Petitioner,
v.
UNITED STATES, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

In the Matter of the Application

of

EARL J. CARROLL,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled proceeding on July 8, 1957.

Citations to Opinions Below

The opinion of the District Court (R. 97a-102a) (printed in the Appendix hereto, *infra*, p. 21), is reported in 145 F. Supp. 634. The opinion of the Court of Appeals (R. 109a-115a), printed in the Appendix hereto, *infra*, p. 27, is as yet unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on July 8, 1957 (R. 116a; p. 35, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Question Presented

Considering the statutory mandate that income earned by a "bona fide resident of a foreign country" from sources without the United States "*shall not be included in gross income and shall be exempt from taxation*" (Section 116, I.R.C. 1939), and the provisions of the Code limiting examinations to what is "required to be included in the return" (Section 3614, I.R.C. (1939), and what is "relevant or material" (Section 7602, I.R.C. 1954), and protecting a taxpayer against an "unnecessary examination" (Section 7605(b), I.R.C. 1954), when an individual has appeared at administrative hearings and established conclusively that he is a bona fide resident of a foreign country may the Internal Revenue Service merely upon alleging its belief that he was not a bona fide foreign resident—without showing any reasonable grounds therefor—invoke the authority of the Courts to compel the individual to reveal the amount of such non-reportable, non-taxable foreign earned income?

Constitutional Provision and Statutes Involved

The Constitutional provision involved is Amendment IV. The statutes involved are: Section 116(a) (1, 3), Sections 54(a) and 3614(a) of the Internal Revenue Code of 1939; and Sections 7602, 7603 and 7605(b) of the Internal Revenue Code of 1954.

The constitutional provision and statutory sections provide as follows:

Constitution of the United States

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Internal Revenue Code—1939

§ 116—Exclusions from Gross Income

In addition to the items specified in section 22(b) the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) Earned income from sources without the United States.

(1) Foreign resident for entire taxable year. In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute earned income (as defined in paragraph (3)); * * *

* * *

(3) Definition of earned income. For the purposes of this subsection, "earned income" means wages, salaries, professional fees and other amounts received as compensation for personal services actually rendered * * *

(Section 911, I.R.C. 1954, provides for the same exemption except that it provides for a greater period of exemption since taxpayer need no longer have been a foreign resident for "the entire taxable year." Under the 1954 Code taxpayer is exempt from reporting and paying tax on foreign earned income if he has been a bona fide resident of a foreign country "for an uninterrupted period which includes an entire taxable year.")

§ 54—Records and Special Returns

(a) By taxpayer. Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

§ 3614—Examination of Books and Witnesses

(a) To determine liability of taxpayer. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required, to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

Internal Revenue Code—1954

§ 7602—Examination of Books and Witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inqury; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

§ 7603—Service of Summons

• • • When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

§ 7605—Time and Place of Examination

* * * * *

(b) Restrictions on examination of taxpayer.—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

Statement

This case concerns the authority of the Internal Revenue Service to conduct a general investigation of a non-resident's earned income received from sources without the United States when, by statute, that income is *exempt* from taxation, and the individual need not file a tax return or keep records pertaining to such income.

Petitioner has been a bona fide resident of Germany from November, 1946, when he went there for an indefinite period to engage in the civilian practice of law (R. 69a). Prior thereto Petitioner, as a United States army officer, was assigned to duty in Germany. He continued to reside in Germany until March, 1955, except for the period beginning in January, 1948, when his German entry permit was revoked and he was refused a re-entry permit until March, 1949 (R. 32a-33a). Petitioner maintained a law office and his residence in Germany for nine years until March, 1955 when he moved to Switzerland, his present place of residence (R. 69a). On a visit to the United States in December, 1955 he was subpoenaed to appear before an officer of the Internal Revenue Service. He appeared and gave testimony at two hearings—on August 16 and 27, 1956 (R. 54a). He answered fully all questions asked of him except those relating to "contrac-

tual and financial terms'' and ''income earned'' in Germany during the period of his bona fide residence in Germany (R. 6a). Petitioner's position was that since he had fully testified and conclusively demonstrated that he was a bona fide resident of a foreign country and since there had been absolutely no testimony or evidence adduced at these hearings to contradict this showing, any further inquiry into the details and amounts of income which was exempt from taxation and exempt from being included in a return would be an unreasonable search and an oppressive and unnecessary investigation (R. 29a-30a). Throughout all these years Petitioner filed United States tax returns covering income received from sources within the United States which by statute was not exempt from taxation. No element of fraud or deceit is involved in this case.

In order to compel petitioner to testify relative to his foreign earned income and to produce his records regarding the amounts of such tax exempt income, the Internal Revenue Service obtained, *ex parte*, an order (R. 2a) requiring Petitioner to appear and give testimony relating to the contractual and financial arrangements he had with two clients, Frederick Flick and Alfred Krupp von Bohlen during the years in question and to, ''produce all books, records, cancelled checks, memoranda and papers of whatsoever kind or nature pertaining to income or monies received, accrued or credited to his account during the years 1944 to 1954 inclusive . . .''.

Petitioner moved to vacate and quash the *ex parte* order. The District Court for the Southern District of New York denied this motion. The District Court ruled that the government need not make any showing of the necessity or statutory authority for the investigation and that it was sufficient if the moving papers merely allege that the revenue agents, ''have reasonable grounds to believe and do believe that respondent was not a bona fide resident of a foreign country'' (R. 100a).

On appeal to the Court of Appeals for the Second Circuit the decision of the District Court was affirmed. In an opinion by Judge Medina it was recognized that there is an "apparent conflict between the cases dealing with what the tax authorities must show to warrant examination of the taxpayer and others relative to matters which may be barred by the statute of limitations." But the Court held, "that in such situations as the one before us now the Internal Revenue Service need not introduce evidence on the residence issue as a prerequisite to investigation" (R. 115a).

Reasons for Granting the Writ

I

The present case involves the important question of conflict between the power of an administrative agency to interrogate and examine without limitation and the individual's right, protected by the Fourth Amendment, to be secure in his person and papers and to avoid an unnecessary and oppressive investigation into private affairs. The decision of the Court of Appeals for the Second Circuit in this case is in conflict with *Hale* v. *Henkel*, 201 U. S. 43, 76, and *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 306, both of which cases struck down inquiries and onerous subpoenas not justified by the ends sought.

Petitioner demonstrated by facts, not controverted, that he is a "bona fide resident of a foreign country" and his earned income from foreign sources is exempt from taxation and is not reportable. Among other things, he showed that he resided and was physically present in Germany from November, 1946 to March, 1955 except for the period of January, 1948 to March, 1949 when his German entry permit was revoked and except for three short trips he made to the United States—in 1952 for seven days; in 1953 for about four days; and in 1954 for ten days (R. 35a).

In addition to the exemption granted to a bona fide resident of a foreign country, Petitioner was automatically entitled to a complete exemption from taxation for the years 1951 and 1952 under the eighteen months rule since such exemption was granted on the basis of mere physical presence outside the United States for 510 days in an 18 month period (Section 116, I.R.C. 1939, as amended by the Revenue Act of 1951). It cannot be seriously questioned that Petitioner was not only physically outside the United States during the years in question but that he was then and still is a bona fide resident of a foreign country.

Under the regulations and rulings of the Internal Revenue Service, Petitioner is presumed to be a foreign resident "in the absence of known facts" to the contrary where he has resided in a foreign country for as much as a year (O.D. 197, 1 Cum. Bul. 164, as made applicable to the issue of foreign residence by Reg. § 1.911-1 and Reg. § 1.871-2). In view of the fact that Petitioner has resided in Germany for nine years there can be no reasonable doubt but that he was and still is a bona fide foreign resident. (See, *Weible* v. *United States*, 244 F. 2d 158 (9th Cir.); *Larsen* v. *Commissioner*, 23 T. C. 599; *Meek* v. *United States*, 110 F. Supp. 658 (N. D. Col. S. D.); *Seeley* v. *Commissioner*, 186 F. 2d 541 (2nd Cir.); *Walker* v. *Commissioner*, 16 T.C.M. 171).

This is not the ordinary case in which Petitioner denied tax liability and sought to avoid an examination. Here Petitioner responded to an administrative subpoena and testified at two separate hearings; he objected to any examination as to private matters involving income from foreign sources on the grounds that under statutory mandates such income of a bona fide foreign resident was not reportable or taxable (Sec. 116(a), I.R.C. 1939, now Sec. 911, I.R.C. 1954) and that he had clearly demonstrated that he was such a bona fide foreign resident. Also that, in addition, he fell within the eighteen month rule during the years it was in effect.

Petitioner has a constitutional right to have his personal financial affairs protected from any oppressive and unwarranted inquiry and the requested examination involving an area in which he has demonstrated a freedom from any obligation to report or pay taxes is arbitrary and oppressive. As was stated by the Ninth Circuit in *Local 174 v. United States*, 240 F. 2d 387, 390 (9th Cir.), "* * * such a proceeding [to compel testimony and the production of records] is in the nature of a search and seizure which has constitutional overtones * * *." It need hardly be argued that no right is entitled to greater constitutional protection than the right of a citizen to privacy. An invasion of this right of privacy by the Government's subjection of a citizen to an unnecessary and unauthorized examination is an unreasonable search condemned by the Fourth Amendment.

> "It has always been recognized in this country, and it is well to remember, that few, if any, of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs . . ." (*Sinclair v. United States*, 279 U. S. 263, 292).

The law does not authorize Internal Revenue Agents to examine everyone and anyone about any and all subjects, nor does it permit them to examine any and all books and records. The powers are very limited (Section 3614 Internal Revenue Code 1939, now Section 7602 Internal Revenue Code 1954). They are limited to examination "bearing upon matters required to be included in the return". If, as in this case, the information sought is not matter required to be included in a return but involves foreign income which the law says is neither reportable or taxable, then the Internal Revenue Agents lack the power to elicit the information, and the *ex parte* order dated

August 22, 1956, should have been vacated. The language of the statute authorizing examinations was changed slightly in the 1954 Internal Revenue Code, which was passed after the events here involved took place, but at the Congressional hearings it was stated that the meaning of the 1954 enactment was the same as it was under the 1939 code.

Petitioner has been ordered to "* * * produce all books, records, cancelled checks, memoranda and papers of whatsoever kind or nature pertaining to income or monies received, accrued or credited to his account during the years 1944 to 1954 inclusive * * *" (R. 2a). Petitioner has testified that any records he may have, although he was not required to keep any, were at his office in Frankfurt, Germany. To require him to travel about 6,000 miles and gather records for a ten-year period in order to bare for the benefit of the Internal Revenue Service his entire financial life for this period, when he has established that he is exempt from taxation, is an unconstitutional infringement of his individual rights. There can be no justification for requiring the production by an individual, against whom there is no basis for any tax liability, of such a mass of documents with the only specificity being that they cover a ten-year period.

The approach of the Government in requiring an en masse production of documents without specificity has been criticized by the Courts even where it appears that some of the documents may be relevant (*Hale* v. *Henkel, supra,* at p. 77—". . . Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpoena of this description is equally indefensible as

a search warrant would be if couched in similar terms . . ."; *Federal Trade Commission* v. *American Tobacco Company,* 264 U. S. 298, 306); *Oklahoma Press Publishing Company* v. *Walling,* 327 U. S. 186, 208-210; *Schwimmer* v. *United States,* 232 F. 2d 855 (8th Cir.), cert. den. 352 U. S. 833.

II

The decision of the Court of Appeals in the present case is in direct conflict with the following decisions of the Third and Ninth Circuits—*Martin* v. *Chandis Securities Co.,* 128 F. 2d 731 (9th Cir.); *Local 174* v. *United States, supra; Boren* v. *Tucker,* 239 F. 2d 747, 773 (9th Cir.); *Zimmerman* v. *Wilson,* 105 F. 2d 583 (3rd Cir.).

(a) These cases hold that an inquiry cannot be had for a period barred by the statute of limitations or in cases where there is a mere allegation of fraud without any factual showing. In the present case a mere "belief" by the Internal Revenue agent as to petitioner's residence cannot suffice in the light of the overwhelming factual showing made by petitioner as to his bona fide foreign residence. It is submitted that the present situation, involving a statutory mandate making foreign earned income of a non-resident citizen neither reportable nor taxable, presents an even more compelling case for relief than the "statute of limitation" cases. There is nothing *"sui generis"* about the statute of limitation cases. Certainly the principle which governs such cases is equally applicable here.

In the present case the *ex parte* order requiring Petitioner to testify and produce records was obtained upon an affidavit of Mr. Bernard V. Roberts (R. 5a), which fails to allege even on belief that Petitioner was not a bona fide foreign resident. When Petitioner moved to vacate and

quash said *ex parte* order, for the first time Mr. Roberts alleged in an opposing affidavit his "'belief,'' without more, that Mr. Carroll was not a bona fide resident of a foreign country (R. 88a). No factual showing or reason for such "belief'' was made by the Government. Petitioner's motion was denied solely on the statement of "belief'' contained in Mr. Roberts' affidavit.

(b) The Court of Appeals in the present case has stated that there is a conflict among the Circuits with regard to the nature of the showing that must be made by the Government to justify an investigation of a taxpayer as to a tax year barred by the statute of limitations. The Court said: "We are not now called upon to resolve the apparent conflict between the cases dealing with what the tax authorities must show to warrant examination of the taxpayer and others relative to matters which may be barred by the statute of limitations'' (R. 115a).

A reading of the opinions in the cases cited by the Court of Appeals in support of its conclusion reveals that the cases it cites are not in conflict with the Third and Ninth Circuit rulings and that the present case is the only one which conflicts with the settled rule that a showing of the reasonableness and necessity for the examination must be made by the Government.

Peoples Deposit Bank & Trust Co. v. *United States,* 212 F. 2d 86 (6th Cir.), cert. den. 348 U. S. 838, and *In re Wood,* 123 F. Supp. 297, 130 F. Supp. 121 (W. D. Ky.), relied upon by the Court below, involved the well-known net-worth-expenditures method of determining liability in which it was necessary to reconstruct the financial history of taxpayer in prior years. In reconstructing this history the records sought by the Government were records of income and were the only records from which the Government could determine the question of fraud. Moreover, in the *People's Deposit* and *Wood* cases, where the Govern-

ment sought to examine the only records which provided the ultimate proof of fraud, the District Court held hearings and required the Special Agents to give testimony to show reasonable grounds and necessity for the investigations.

In *Norda Essential Oil and Chemical Co.* v. *United States*, 230 F. 2d 764 (2nd Cir.), cert. den. 351 U. S. 964, and *Falsone* v. *United States*, 205 F. 2d 734 (5th Cir.), also relied upon by the Court below, the Government was investigating years not barred by the statute of limitations, to which the records of a closed year were found to be relevant because of the net-worth-expenditures method of reconstructing income. It was conceded in those cases that an open year existed and therefore there was no need for the Government to make a showing that a tax year existed which was open to assessment. *Globe Construction Co.* v. *Humphrey*, 229 F. 2d 148 (5th Cir.) affirmed an unreported District Court case and held that the particular affidavit was sufficient. The contents of this affidavit are not reported and we cannot determine from this case the extent of the Government's showing of relevance and necessity. In *United States* v. *United Distillers Products Corp.*, 156 F. 2d 872 (2nd Cir.), no defense based upon the statute of limitations was made in the District Court. On appeal the defense of the statute of limitations was raised for the first time and rejected, not because the Government did not have to make a showing of possible fraud but because, irrespective of fraud, the tax years involved were not barred if the taxpayer had omitted from gross income a sum exceeding 25% of the amount reported. It was necessary for the Government to examine taxpayers records to determine if this percentage had been exceeded. Finally, *Matter of Levine*, 149 F. Supp. 642, aff'd 243 F. 2d 175 (2nd Cir.) involved a taxpayer, charged with liability for withholding taxes, whom the Government sought to examine regarding open

tax years. There was no possible grounds for denying the investigation into years which were admittedly open to assessment. In the *Levine* case the Court recognized that a different rule would apply if it appeared that no assessment could be made. The Court said: "Nor does he invoke any question of the Statute of Limitations. Thus he has presented no reason for denying the Treasury Department its statutory right to examine him to see if taxes have been properly paid" (149 F. Supp. 642, 643).

(c) The Court of Appeals has also relied upon the decisions of this Court in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, and *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, saying: "Although those cases arose in different context, we think them applicable here". However, we believe that the *Oklahoma Press* and *Endicott Johnson* cases decided by this Court do not govern the present one since (1) they involve statutes, other than the Internal Revenue Code, in which the administrative investigatory power is not subject to the explicit restraints of the Internal Revenue Code, and (2) they do not involve a situation where a party at an administrative hearing demonstrated that any further inquiry would be oppressive, unnecessary and an unreasonable search in violation of the Fourth Amendment.

Endicott Johnson Corp. v. *Perkins*, 317 U. S. 501, involved the Walsh Healy Public Contracts Act, 49 Stat. 2036, chap. 881 41 U.S.C. §§ 35-45. Section 5 of this Act (41 U.S.C. § 39) gives the Secretary of Labor the authority to:

> "* * * make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States."

The Secretary of Labor subpoenaed certain records of the Company and the District Court refused to enforce the subpoena because of its finding that the Company was not covered by the Act. The Supreme Court upheld the subpoena. Mr. Justice Jackson indicated that the District Court could not make an initial determination of coverage because the Walsh Healy Act gave the Secretary of Labor, and no one else, the power to conclusively determine the facts. He said, at 317 U. S. 509:

> "The consequence of the action of the District Court was to disable the Secretary from rendering a complete decision on the alleged violation as Congress had directed her to do, and that decision was stated by the Act to be conclusive as to matters of fact for purposes of the award of government contracts".

The *Endicott Johnson* decision was followed in *Oklahoma Press Pub. Co.* v. *Walling, supra,* a case which involved the administrative subpoena power under the Fair Labor Standards Act, 52 Stat. 1060, chap. 676, 29 U.S.C. § 211(a). Again this Court decided that the statute gave the Administrator and not the District Court the authority to determine coverage. Mr. Justice Rutledge said:

> "We think, therefore, that the Court of Appeals were correct in the view that Congress has authorized the Administrator, rather than the District Courts in the first instance to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon *that* question, by seeking the production of petitioner's relevant books, records and papers; and, in case of refusal to obey his subpoena, issued according to the statutes' authorization, to have the aid of the District Court in enforcing it" (327 U. S. 186, 214) (Emphasis supplied).

In comparison to the Walsh Healy Act and the Fair Labor Standards Act the Internal Revenue Code strictly limits the investigatory power of the Internal Revenue Service and it is for the Courts and not the administrative agency to ultimately determine the facts. *Meals* v. *United States*, 110 F. Supp. 658. Under the Internal Revenue Code an examination can only involve records, which bear upon matters "required to be included in the return" (Section 3614, I.R.C. 1939) and "which may be relevant or material to such inquiry" (Section 7602, I.R.C. 1954). In addition, unlike the statutes involved in *Endicott Johnson* and *Oklahoma Press*, the Internal Revenue Code explicitly states:

> "No taxpayer shall be subject to unnecessary examination or investigation" (Section 7605(b), I.R.C., 1954).

Furthermore, the *Endicott* and *Walling* cases involved statutes which gave the administrative agencies the exclusive authority to determine coverage, but it has repeatedly been held that under the Internal Revenue Code the Courts are the final arbiters on this issue. This is so even though Section 911(a), I.R.C. 1954, requires an individual to establish to the satisfaction of the Secretary or his delegate that he has been a bona fide resident of a foreign country. The Courts' decisions are not limited to the question of whether the Secretary has abused his discretion in not being satisfied. The Tax Court as well as the District Courts are authorized as a matter of law to examine the facts *de novo* and are not bound by the findings of the Secretary. See, *Hamer* v. *Commissioner*, 22 T. C. 343, 349; *Walker* v. *Commission*, *supra*; *Meals* v. *United States*, *supra*.

(d) In the present case Petitioner has appeared at two administrative hearings and has fully answered all questions relative to his foreign residence. Considering his

showing of bona fide residence and considering the unusual burden the Government seeks to impose upon Petitioner by requiring him to transport from Germany his records over a ten-year period and considering the language of the Internal Revenue Code itself, the *Endicott Johnson* and *Oklahoma Press* cases are not controlling of the present situation. These cases did not involve the question of whether the scope of the investigation constituted an unreasonable search in violation of the Fourth Amendment and this Court has recognized that there may be a distinction when a case of that sort should arise:

> ". . . the requirement of reasonableness, including particularity in 'describing the place to be searched, and the persons or things to be seized,' also literally applicable to warrants, comes down to specification of the documents to be produced, adequate, but not excessive, for the purposes of the relevant inquiry." (*Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 209.)

After petitioner had conclusively demonstrated he was a bona fide resident of a foreign country it was the Government's burden to show that the documents summoned were "adequate, but not excessive," for the purposes of the investigation. The mere statement that the Government believes Petitioner not to be a foreign resident is insufficient to deprive Petitioner of the constitutional and statutory protections which are guaranteed to him.

(e) The Court of Appeals after stating that the "kind of legal work which petitioner did during these years, for whom, how much and on what basis he was paid, how he was paid and when, they all seem to bear largely on the amount of his income," continued to state, "it cannot be said that such information regarding the activities of a professional man are irrelevant to the question of his residence" (R. 115a). Respectfully it is submitted that

the latter expression by the Court of Appeals sidetracks the issue. First, the Government makes no pretense of seeking such information on the question of residence. Second, what rational relationship can there be between the details and amounts of income received from foreign sources and the independent substantive question of Petitioner's foreign residence? The reasonableness of and necessity for the investigation must first be shown before the inquiry may proceed.

> ". . . It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up." *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 306 (1924).

(f) Congress in its wisdom has seen fit to place the authority to compel the attendance of a witness and the production of books and records in the Federal Courts. (Section 7604(a), I.R.C. 1954). When the Government seeks to utilize the judicial machinery for making its investigation it cannot refuse, as it has in the present case, to show that there are reasonable grounds for conducting the investigation.

> ". . . By thus making the federal judiciary the affirmative agency for enforcing the authority . . . Congress necessarily brings into play the specific provisions of the Constitution relating to the prosecution of offenses and those implied restrictions under which courts function." (*Watkins* v. *United States*, U. S. Sup. Ct. (June 17, 1957) 1 L. Ed. 2d 1273, 1300.)

Petitioner is entitled to the protection of a statutory mandate, under which income from foreign sources earned by a bona fide foreign resident is not reportable to the United States Internal Revenue Service and is not taxable. We urge upon this Court the view expressed by the

District Court in *In re Brooklyn Pawnbrokers, Inc.*, 39 F. Supp. 304, 305, a case dealing with an attempted inquiry into tax matters involving a year barred by the statute of limitations, that the Court should assure a citizen, "that freedom from unreasonable harassment that he has the right to expect under a democratic form of government."

The present case is in conflict with the decisions of this Court and with the decisions of Courts in two other Circuits as hereinabove indicated and it also deprives petitioner of the constitutional protection to which he is entitled, from an arbitrary and oppressive inquiry into his private affairs.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN P. MCGRATH,
Counsel for Earl J. Carroll,
Petitioner.

August 15, 1957.

APPENDIX

Opinion of the United States District Court

(116) EDELSTEIN, D. J.:

This is a motion to vacate an ex parte order directing respondent, in effect, to obey an Internal Revenue Service summons that had been previously served on him. Section 7601 of the Internal Revenue Code of 1954 authorizes the Secretary of the Treasury or his delegate to inquire after all persons who may be liable to pay an internal revenue tax, and Section 7602 provides for the examination of books and records and the taking of testimony which may be relevant or material to such inquiry. The analogous section of the 1939 Code, Section 3614, provided for the examination of books and the taking of testimony "bearing upon the matters required to be included in the return", but the phrasing of Section 7602 of the 1954 Code, in terms of data and (117) testimony which "may be relevant or material" to the inquiry constitutes no material change from the prior law. Senate Committee Report No. 1622, p. 617, Section 7605(b) requires that no taxpayer shall be subjected to unnecessary examination or investigations. The examination of the respondent, who claims to have been, in the years under investigation, a bona fide resident of Germany whose income derived from the practice of international law, is directed not only to his general liability for taxes but also to the specific amounts payable. Respondent refused to answer questions or furnish data that he considers to bear upon the amount of tax payable, consenting only to submit to examination on his status as a bona fide resident of Germany. Any other examination, he contends, is unnecessary and not relevant or material to the inquiry, or "bearing upon the matters required to be included in the return", because under Section 116 of the 1939 Code, his income for the years in

question was not reportable or taxable, being earned income of a bona fide foreign resident.

The pleadings which frame the issue for decision are the application for enforcement of the summons, consisting of two affidavits, the motion to vacate the ex parte order and the affidavit in opposition. The (118) application for the ex parte order is treated as a complaint, and under Rule 8(a) of the Federal Rules of Civil Procedure it is necessary for the complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Martin* v. *Chandis Securities Co.* (9 Cir.) 128 F. 2d 731. From the "complaint" it appears that the respondent was subpoenaed to appear before an officer of the Internal Revenue Service; that he declined to answer certain questions relating to the contractual and financial terms between himself and certain persons during the years 1944 and 1954; that he declined to furnish any information concerning other income earned in Germany or other foreign countries during the years 1944 to 1954 inclusive; and that he failed to produce for examination the books, records and papers required by the subpoena. Without more, it is apparent from the face of the complaint that the information sought is relevant to the inquiry concerning persons who may be liable to pay an internal revenue tax, or that it bears upon matters required to be included in a return, and by the very nature of the information required it does not appear to be unnecessary. Thus, the complaint does not fail to state a claim for relief.

(119) Respondent attempts to raise the issues of relevance and necessity by the allegations of fact in his motion to vacate. He sets forth at length facts to indicate that, during the years in question, his income consisted of fees earned as an international lawyer while he was a

bona fide resident of Germany, thus qualifying him from exemption from the filing of a return and the payment of taxes under Section 116 of the 1939 Code. If he is not required to file a return for those years, an inquiry into the details of his income cannot be relevant or necessary. Therefore, he argues, the only inquiry presently proper is on the issue of his foreign residence.

Apparently he demands some sort of a threshold determination of the issue, but it is not at all clear how such a determination is to be achieved. The contention that the Internal Revenue Service is required to permit him to establish his bona fide foreign residence at the inquiry is without merit. The inquiry is strictly inquisitorial and not a judicial proceeding where rights are finally determined. *In re Albert Lindley Lee Memorial Hospital* (2 Cir.), 209 F. 2d 122; *Matter of Sidney S. Levine*, 1956 P-H Fed. Tax Service, Par. 72,535 (S.D.N.Y., 1956, not officially reported), affirmed on the opinion of Judge Kaufman, 1956 P-H Fed. Tax (120) Service Par. 71,092 (2 Cir., 1956, not officially reported). The power vested in the Secretary is similar to the power vested in federal grand juries. *Falsone* v. *United States* (5 Cir.), 205 F. 2d 734. A grand jury is not required to hear and decide the defenses of a prospective defendant.

Nor does this court have the power at this time to decide the issue of foreign residence so as to determine the coverage of the defendant by the internal revenue laws. Cf. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501; *Okla. Press Pub. Co.* v. *Walling*, 327 U. S. 186. Congress has conferred upon the Secretary the power and duty to administer the internal revenue laws, including the law relating to the exemption from taxation of foreign residents, and it has provided a method of inquiry for effectuating that purpose. The eventnal decision of whether or not an assessment shall be made is one for the appro-

priate administrative authority, not for the court, to decide the issue of coverage now might preclude an inquiry by the administrative authority and disable it from carrying out its prescribed function. The issue of bona fide foreign residence may, in due course, reach the court in a suit for a refund, but the court may not short circuit the procedure by usurping the administrative function.

(121) The statute of limitations cases relied upon by the respondent are consistent with this conclusion. In *Martin* v. *Chandis Securities Co.* (9 Cir.) 128 F. 2d 731, the complaint indicated on its face that inquiry was sought into years for which the statute of limitations had run, and there was no allegation that the return was false or fraudulent so that limitation would not apply. The case is simply one where the complaint failed to state a claim for relief. It by no means stands for the proposition that the court must make an initial determination of coverage. On the contrary, where the statute of limitations is involved on the face of the complaint, an inquiry may be required upon merely a conclusory allegation of suspicion of a false and fraudulent tax return, without even the necessity of the proof of facts showing reasonable grounds to believe the return to be fraudulent. *United States* v. *United Distillers Products Corp.* (2 Cir.) 156 F. 2d 872; *In re Wood*, 123 F. Supp. 297, and 130 F. Supp. 121. In *Falsone* v. *United States* (5 Cir.) 205 F. 2d 734, it appeared that the statute of limitations had run against the returns for certain years, but an inquiry into those years was permitted on an allegation that it was necessary to a so-called net worth case involving more recent years. Thus, even if there appeared on the face of the application for the ex parte order, in (122) the case at bar, facts indicating that the respondent was a bona fide foreign resident during the years in question, an allegation that the Internal Revenue Service agents have reasonable grounds to believe and do believe that the respondent was not a bona

fide resident of a foreign country during those years, within the meaning of the Internal Revenue Code, would suffice to sustain the order. Inasmuch as the facts are alleged in the motion to vacate, the allegation of belief set forth in the affidavit in opposition suffices, and no further showing is required.

Other cases cited by the respondent are merely those where the showing made by the Government clearly indicated a lack of relevance or necessity. The burden of establishing that the information sought was actually needed and necessary was not met where the examination was for the purpose of aiding the Government in defense of a lawsuit, in lieu of an examination before trial, *Pacific Mills* v. *Kenefick* (1 Cir.) 99 F. 2d 188; or for the purpose of procuring evidence that might be material in verification of the tax return of some other person than the one examined, not known to the Bureau of Internal Revenue, and who may or may not have made a return, *McDonough* v. *Lambert* (1 Cir.), 94 F. 2d 839; *Mays* v. *Davis*, 7 F. Supp. 596; *In re International Corporation*, 5 F. Supp. 608. But where, as here, the (123) Internal Revenue Service agents state that they have made an investigation, that they have reasons to believe taxes are owing, and that the data sought are necessary to the completion of their inquiry, the burden of showing necessity is met.

The Government has no burden of showing probable cause to justify its inquiry by summons. Only where a third party is requested to produce records relating to a taxpayer under investigation is there a requirement for the Government to establish that the benefit it will derive from the data sought bears a reasonable relation to the burden placed on the respondent. *First Nat. Bank of Mobile* v. *United States* (5 Cir.) 160 F. 2d 532; *United States* v. *Third Northwestern Nat. Bank*, 102 F. Supp. 879; *Matter of Sidney S. Levine, supra.* A requirement of a prior showing or determination of tax liability would

defeat the purpose of Section 7601, which authorizes inquiry after persons "who may be liable to pay any internal revenue tax". A taxpayer may not refuse to disclose the details of his income because he believes that the income is not taxable, and thereby frustrate an inquiry by requiring proof to the contrary in advance.

In any event, it does not appear that the issue of general tax liability is insulated from the details of the respondent's income. Only earned income is (124) exempt under Section 116 of the 1939 Code, and the Government is entitled to inquire into the income source. If, as has been indicated, respondent received fees in property rather than in cash, any gain realized from that property would not be earned income, under the definition of Section 116. Furthermore, it appears that some part of the fees he received was for work done in the United States, and compensation for such work is taxable. Finally, the Government contends that the details of his income are necessary to decide the residence question on the ground that such items as the amount of taxes paid to the German Government and the ratio of military to non-military cases handled by respondent abroad are relevant to the issue. He denies the relevance of such information to the question of residence; but the determination of relevancy "is a burden and responsibility which the proposed witness should not assume." *Stone* v. *Frandle*, 89 F. Supp. 222, 224. "Obviously, the taxpayer cannot be the judge of what books and papers are relevant and material, and thus restrict the examination of his financial affairs to papers of his own selection. A determination of the matter, in the first instance at least, is for the Commissioner, who is charged with the duty of verifying (125) the correctness of the taxpayer's returns." *In re International Corporation Co.*, 5 F. Supp. 608, 611.

Accordingly, the motion to vacate will be denied.

Dated: January 2nd 1957.

DAVID N. EDELSTEIN,
United States District Judge.

Appendix.

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 362—October Term, 1956.

(Argued June 4, 1957 Decided July 8, 1957.)

Docket No. 24468

In the Matter of the Application of the

UNITED STATES,

Appellee,

for an Order compelling

EARL J. CARROLL,

Appellant,

to comply with an Internal Revenue Summons.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, David N Edelstein, *Judge.*

Taxpayer appeals from an order denying his motion to vacate an *ex parte* order directing him to obey an Internal

Revenue summons that had been previously served on him. Reported below at 149 F. Supp. 634. Affirmed.

PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, New York City (Foster Bam and Miriam R. Goldman, Assistant United States Attorneys, New York City of Counsel), *for appellee.*

HODGES, REAVIS, MCGRATH & DOWNEY, New York City (John P. McGrath, Martin D. Jacobs and Martin H. Proyect, New York City, of Counsel), *for appellant.*

MEDINA, *Circuit Judge:*

Appellant, an American citizen, lived and practiced law in Germany for most of the time from 1946 to 1954. During that period, he numbered among his clients Alfred Krupp von Bohlen and Halback, and Frederick Flick, the German industrialists. He may have earned a substantial amount of money from his practice, but he reported none, claiming to be within the exemption of Section 116 of the Internal Revenue Code of 1939 (substantially re-enacted I. R. C. 1954, Section 911), which applies to wages, salaries, professional fees and other amounts received as compensation for personal services actually rendered, earned without the United States by an American citizen who establishes to the satisfaction of the Secretary that he is a bona fide resident of a foreign country.

Appendix.

Opinion of the United States Court of Appeals.

Acting pursuant to authority conferred by law,[1] agents of the Internal Revenue Service summoned appellant to appear and give testimony relative to his residence and earnings in Germany. At hearings on August 16 and 17, 1956, appellant testified at length concerning his residence abroad. He refused, however, to answer questions relating to the following matters:

(a) The contractual and financial terms between Earl J. Carroll and Alfred Krupp von Bohlen and Halback during the years 194[illegible] through 1954.

---

[1] The Internal Revenue Code of 1954 provides in pertinent part (omissions not indicated):

§ 7601. The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax.

§ 7602. For the purpose of determining the liability of any person for any internal revenue tax, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate and to produce such books, papers, records or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

§ 7604. The United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) The contractual and financial terms between Earl J. Carroll and Frederick Flick during the years 1944 through 1954.

(c) Any and all information concerning other income earned in Germany or other foreign countries during the years 1944 to 1954, inclusive.

His refusal was based on the ground that he had conclusively demonstrated his bona fide residence in a foreign country, thus rendering investigation of his earnings there "unnecessary" within the meaning of I. R. C. 1954, Section 7605(b).[2]

The agents then sought and obtained from the District Court an *ex parte* order compelling appellant to testify in accordance with the summons that had been served upon him. Appellant thereupon moved the District Court to vacate the *ex parte* order, which motion was denied by Judge Edelstein, in an opinion reported at 149 F. Supp. 634, and this appeal followed. We think the decision and reasoning of the District Court were correct.

Appellant relies on two cases in particular to support his position. In *Martin* v. *Chandis Securities Co.*, 9 Cir., 128 F. 2d 731, the court affirmed an order of the court below quashing a previous order compelling testimony, on the ground that the testimony was "unnecessary" because the application for the initial order showed on its face that the claim was barred by limitations. The Government contended in that case that since a claim based on fraud would not be barred, further investigation was not "unnec-

[2] No taxpayer shall be subjected to unnecessary examinations or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

essary." The parties agreed that the Government was obliged to allege only reasonable grounds for suspicion of fraud, and the court expressly refrained from expressing an opinion on what the Government must allege. The holding was that the Government had not shown such grounds.

In *In re Brooklyn Pawnbrokers, Inc.*, E. D. N. Y., 39 F. Supp. 304, Judge Moscowitz held that, where the Government is investigating a claim barred by limitations in the absence of fraud, a general allegation of fraud is insufficient, that the Government is required to set forth facts affording reasonable basis for a suspicion of fraud. The holding was that "to permit the Government to examine as to statute barred years upon a mere conclusory allegation of fraud is to deprive the taxpayer of that freedom from unreasonable harassment that he has a right to expect under a democratic government."

There are cases going the other way. In *In re Keegan*, S. D. N. Y., 18 F. Supp. 746, the person summoned likewise objected that the statute of limitations had run. The Government said merely that it wished to investigate the possibility of fraud, to which it was replied that this was a "fishing expedition." Judge Patterson refused to vacate the order requiring obedience to the summons, saying, "Of course it is a fishing expedition, but it is none the less an examination which the revenue officers are entitled to make. I take it that whenever the officers charged with gathering in income tax decide to make a check to see whether a taxpayer has paid the full amounts due, they are doing no more than their duty when they summon persons with whom the taxpayer may have had dealings of a financial nature to reveal those dealings * * *."

In another case in which the investigation was said to be "unnecessary" because of the statute of limitations, *Peoples Deposit Bank & Trust Co.* v. *United States*, 6 Cir.,

212 F. 2d 86, cert. denied 348 U. S. 838, "a special agent of the Bureau of Internal Revenue testified in substance, that from his investigation he had concluded that there was strong suspicion of a false or fraudulent tax return by E. F. Prichard, Sr., for a certain year or years prior to the statutory limitation." The court held that "The special agent was not obliged to disclose in detail the facts relative to his investigation and conclusion, nor was the District Court obliged to require proof of facts showing reasonable grounds to believe that the tax returns of E. F. Prichard, Sr., and others were false or fraudulent." This decision was followed in *In re Wood*, W. D. Ky., 123 F. Supp. 297, 130 F. Supp. 121.

Several cases have held investigations not to be "unnecessary," although it does not appear that facts were alleged which indicated probable cause for the investigation. *Norda Essential Oil and Chemical Co.* v. *United States*, 2 Cir., 230 F. 2d 764, cert. denied 351 U. S. 964; *Globe Construction Co.* v. *Humphrey*, 5 Cir., 229 F. 2d 148; *Falsone* v. *United States*, 5 Cir., 205 F. 2d 734, cert. denied 346 U. S. 864; *United States* v. *United Distillers Products Corp.*, 2 Cir., 156 F. 2d 872. In *Matter of Levine*, 2 Cir., 243 F. 2d 175, affirming an opinion below, 149 F. Supp. 642, we adopted Judge Kaufman's statement that the Code "requires no showing by petition or affidavit that there is cause for believing taxes have not been properly paid where the examination is of the taxpayer himself as is the case here. The very purpose of the examination is to discover whether tax liability exists, and the provision was put into the law to enable the Treasury Department to perform its statutory duty of ensuring that taxes are being properly paid * * *. The question of probable cause for such investigations comes into play when a third party is requested to produce records relating to the taxpayer under investigation." The

opinion goes on to say that the petitioner has pointed out no procedural defect, "Nor does he invoke any question of the Statute of Limitations. Thus he has presented no reason for denying the Treasury Department its statutory right to examine him to see if taxes have been properly paid."

In analogous situations the Supreme Court has held that the Administrator need not establish coverage prior to investigating possible liability. *Okla. Press Pub. Co.* v. *Walling*, 327 U. S. 186; *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501. Although those cases arose in different contexts, we think them applicable here. The taxpayer may not compel the Internal Revenue Service to defer its investigation until it has litigated the residence issue. It is not unlikely that a victory for the Service in such a contest might turn out to be an empty one, due to the running of the statute of limitations or the disappearance of leads to the extent of liability. The taxpayer is not entitled to sidetrack the investigation while the trail grows cold. The stricture against "unnecessary" examinations was designed to prevent uselessly repetitive procedures and investigations not relevant to possible tax liability, not to nullify the preceding sections of the Code.

We are not now called upon to resolve the apparent conflict between the cases dealing with what the tax authorities must show to warrant examination of the taxpayer and others relative to matters which may be barred by the statute of limitations. But we do hold that in such situations as the one before us now the Internal Revenue Service need not introduce evidence on the residence issue as a prerequisite to investigation. Were we to hold otherwise we would permit the taxpayer to control the course of the investigation and deprive the Government of the legitimate and wholly desirable advantage, which may well

prove decisive in particular cases, of pursuing *pari passu* the issues relating to earnings and income on the one hand and to residence abroad on the other. No one can tell until after the event, and the examination of the taxpayer has been concluded, what may or may not be the interrelation between these seemingly separate and distinct matters. Indeed, although the kind of legal work which petitioner did during these years, for whom, how much and on what basis he was paid, how he was paid and when, may all seem to bear largely on the amount of his income, it cannot be said that such information regarding the activities of a professional man are irrelevant to the question of his residence.

Affirmed.

Appendix.

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of July one thousand nine hundred and fifty-seven.

Present:

Hon. HAROLD R. MEDINA,
Hon. J. EDWARD LUMBARD,
Hon. STERRY R. WATERMAN,
Circuit Judges

In the Matter of the Application of

EARL J. CARROLL,

Appellant.

UNITED STATES,

Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

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No. 379

In the Supreme Court of the United States

OCTOBER TERM, 1957

EARL J. CARROLL, PETITIONER,

v.

UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Pet. 21-26) is reported at 149 F. Supp. 634. The opinion of the Court of Appeals (Pet. 27-34) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1957. (Pet. 35.) The petition for a writ of certiorari was filed on August 17, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the courts below correctly concluded that a determination that taxpayer was not a bona fide resident of a foreign country during the taxable years in question was not a condition precedent to investigation of his tax liability for that period.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 116. EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) [As amended by Sec. 148(a), Revenue Act of 1942, c. 619, 56 Stat. 798; Sec. 107(b), Revenue Act of 1943, c. 63, 58 Stat. 21; Sec. 321(a), Revenue Act of 1951, c. 521, 65 Stat. 452] *Earned Income from Sources Without the United States.*—

(1) *Bona fide resident of foreign country.*—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Secretary that he has been a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute earned income (as defined in paragraph (3)) attributable to such period; but such individual shall not be allowed as a deduction from his gross

income any deductions properly allocable to or chargeable against amounts excluded from gross income under this paragraph.

* * * *

(3) *Definition of earned income.*—For the purposes of this subsection, "earned income" means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. In the case of a taxpayer engaged in a trade or business in which both personal services and capital are material income producing factors, under regulations prescribed by the Commissioner with the approval of the Secretary, a reasonable allowance as compensation for the personal services rendered by the taxpayer, not in excess of 20 per centum of his share of the net profits of such trade or business, shall be considered as earned income.

* * * *

(26 U.S.C. 1952 ed., Sec. 116.)

The provisions of the Internal Revenue Code of 1954, Section 911(a)(1) and (b), (26 U.S.C. 1952 ed., Supp. II, Sec. 911) are substantially the same.

Internal Revenue Code of 1954:

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(a) *General Rule.*—The Secretary or his delegate shall, to the extent he deems it practicable,

cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7601.)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books,

papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry * * *.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7602.)

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) *Enforcement.*—Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the require-

ments of the summons and to punish such person for his default or disobedience.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7604.)

SEC. 7605. TIME AND PLACE OF EXAMINATION.

* * * *

(b) *Restrictions on Examination of Taxpayer.*—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7605.)

STATEMENT

Earl J. Carroll, hereafter referred to as the taxpayer, is an American citizen and a member of the California Bar. He served as an Air Force officer during World War II, part of his duties involving legal work in Germany. After discharge from the service, he, in November, 1946, returned to Europe. From 1946 to 1954, inclusive, comprising most of the taxable period here involved, he practiced law in Germany, numbering among his clients Alfred Krupp von Bohlen and Halbach, and Frederick Flick, the German industrialists. Although he admitted having received income from his foreign endeavors—the Court of Appeals concluded (Pet. 28) that "He may have earned a substantial amount of money from his

practice"—he did not report this in the returns which he filed for the period in question. (R. 14a-17a, 24a, 31a, 32a, 69a, 87a.)[1]

Pursuant to the provisions of Section 7601 of the Internal Revenue Code of 1954, *supra*, the Treasury Department began an inquiry into the taxpayer's liability. (R. 8a, 86a.) On December 6, 1955, agents of the Internal Revenue Service, pursuant to the provisions of Section 7602 of the Internal Revenue Code of 1954, summoned taxpayer to appear and give testimony relating to his tax liability for the period 1944 to 1954, inclusive, and to bring with him and produce for examination (R. 9a-10a):

> All books, records, cancelled checks, memoranda and papers of whatsoever kind or nature pertaining to income or monies received, accrued or credited to your account during the years shown above; including specifically the following: (1) Information relating to amounts received and disbursed in the Krupp and Flick matters; (2) Information relating to court martial and all other fees received by you during the years shown; and, (3) The dates on which you arrived in and departed from the United States (and foreign countries) for the years shown.

At hearings on August 16 and 17, 1956, the taxpayer testified at length as to his residence abroad. He failed, however, to produce any of the requested documentary material, and he refused to answer questions concerning his contractual and financial re-

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[1] References designated "R." are to the appendix to petitioner's brief in the Court of Appeals.

lations with Krupp and Flick and to give any information concerning other income earned in Germany or other foreign countries during the period in question. His refusal was based on his allegation that he had conclusively demonstrated that during that period he was a bona fide resident of a foreign country. Allegedly, therefore, under the provisions of Section 116(a)(1) of the Internal Revenue Code of 1939 and Section 911(a)(1) of the Internal Revenue Code of 1954, any income which he had earned abroad was not taxable income, thus rendering any investigation of his foreign earnings "unnecessary" within the meaning of Section 7605(b) of the Internal Revenue Code of 1954. (R. 6a, Pet. 28-30.)

Subsequently, on *ex parte* application for enforcement of the summons made pursuant to the provisions of Section 7604 of the Internal Revenue Code of 1954, the United States District Court for the Southern District of New York entered an order on August 22, 1956, requiring the taxpayer to comply with the summons. The taxpayer thereupon moved to vacate the order. The motion was denied. An appeal was taken from the order denying the motion to vacate. The Court of Appeals affirmed the order of the District Court. (R. 2a, Pet. 30, 35.)

ARGUMENT

1. In holding that the taxpayer was required to testify and produce records concerning income earned but admittedly not reported during the period 1944 through 1954—without prior resolution of the claimed defense that such income was exempt from taxation

by virtue of the taxpayer's alleged foreign residence—the decision below correctly enforces the investigatory authority conferred by Section 7602 of the Internal Revenue Code of 1954, *supra*. That section in part provides that, for the purpose of ascertaining the correctness of any return or determining the tax liability of any person, the Secretary or his delegate is authorized to summon the person liable for tax to give such testimony and to produce for examination such documentary material as may be relevant or material to the investigation. The right to investigate—a corollary of the duty which Congress has imposed upon the Treasury Department (Section 7601(a) of the Internal Revenue Code of 1954, *supra*)—has been broadly construed. Cf. *Civil Aeronautics Board* v. *Hermann*, 353 U. S. 322; see also *Falsone* v. *United States*, 205 F. 2d 734, 742 (C. A. 5th), certiorari denied, 346 U. S. 864. The only statutory restrictions are (1) that no taxpayer shall be subjected to "unnecessary examination or investigations," and (2) that except upon the taxpayer's request or upon written notice given by the Secretary, "only one inspection of a taxpayer's books of account shall be made for each taxable year." Section 7605(b) of the Internal Revenue Code of 1954, *supra*.

The taxpayer has not contended below, nor does he now contend, that the information and material sought to be obtained through the summons proceeding are not germane to an investigation of his tax liability, if the income which is the subject of the investigation is taxable. The substance of his posi-

tion is that all inquiry into the nature and amount of that income is foreclosed simply because, having (Pet. 9) allegedly "clearly demonstrated that he was * * * a bona fide foreign resident," the income sought to be determined was in any event exempt, and it would therefore follow that any inquiry concerning it would be "unnecessary" under Section 7605(b) and would constitute (Pet. 10) "an unreasonable search condemned by the Fourth Amendment." The basic fallacy of his position lies in the underlying assumptions (a) that resolution of the residence issue was a condition precedent to the investigative function; and (b) that the taxpayer had conclusively demonstrated in the District Court proceedings that during the taxable period he was a bona fide resident within the meaning of the exemption provisions of the 1939 and 1954 Codes.

(a) As to the first assumption, the short answer is that even if the taxpayer was a bona fide foreign resident, only "earned income" is exempt under the Code provisions.[2] Accordingly, the Government is entitled to inquire into the source of income, in order to determine whether the taxpayer's income included amounts received other than by way of compensation for services; for example, whether the taxpayer had received fees in property rather than in cash, in which event any gain realized in turn from such property would not be earned income within the meaning of the exemption provisions. The Govern-

[2] Section 116(a) of the 1939 Code, *supra*, and Section 911(a) of the 1954 Code, *supra*.

ment is also entitled to inquire whether any part of the fees received was for work done in the United States, in which event the compensation for such work would be taxable.

Furthermore, in ascertaining whether compliance with the provisions of the summons was required on the basis of the pleadings and affidavits before it, it is questionable whether the District Court could decide the issue of foreign residence so as to determine whether or not an assessment should be made against the taxpayer. Cf. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501; *Okla. Press Pub. Co.* v. *Walling*, 327 U. S. 186. Inquiry into possible tax liability is not a judicial proceeding where rights are finally determined; it is plainly inquisitorial in nature (*Faisone* v. *United States, supra*, p. 737; *In re Wood*, 123 F. Supp. 297, 302 (W.D. Ky.); *Torras* v. *Stradley*, 103 F. Supp. 737, 739 (N.D. Ga.); *Bolich* v. *Rubel*, 67 F. 2d 894, 895 (C.A. 2d)) and, in a sense, is analogous to the power vested in federal grand juries, which are not required to hear and decide the defenses of a prospective defendant (*Falsone* v. *United States, supra*, p. 737). As stated by the District Court (Pet. 24): "The issue of bona fide foreign residence may, in due course, reach the court in a suit for a refund, but the court may not short circuit the procedure by usurping the administrative function."

And finally, as the Government alleged (R. 87a-88a), and as both courts below apparently agreed (Pet. 26, 34), the information and materials sought to be obtained by the summons procedure were not only relevant to a determination of the taxpayer's

income, but to resolution of the residence question as well. As the court below stated (Pet. 34):

> No one can tell until after the event, and the examination of the taxpayer has been concluded, what may or may not be the interrelation between these seemingly separate and distinct matters. Indeed, although the kind of legal work which petitioner did during these years, for whom, how much and on what basis he was paid, how he was paid and when, may all seem to bear largely on the amount of his income, it cannot be said that such information regarding the activities of a professional man are irrelevant to the question of his residence.

To hold, therefore, that determination of the residence issue was a prerequisite to investigation would defeat the statutory purpose of inquiring "after * * * all persons * * * who may be liable to pay any internal revenue tax" (Section 7601 of the 1954 Code, *supra*) just as much as would obviously be the case if, in a situation involving only income earned in the United States, a taxpayer, upon denial of liability, could require the Government to prove tax liability in advance of any investigation. As the Court of Appeals observed (Pet. 33-34)—

> Were we to hold otherwise we would permit the taxpayer to control the course of the investigation and deprive the Government of the legitimate and wholly desirable advantage, which may well prove decisive in particular cases, of pursuing *pari passu* the issues relating to earnings and income on the one hand and to residence abroad on the other.

(b) As to the second assumption underlying the taxpayer's position—that he had conclusively demonstrated that he was a bona fide resident of a foreign country during the taxable period—the fact is that the District Court had before it the affidavit of an appropriate official of the Internal Revenue Service, casting serious doubt upon the correctness of the taxpayer's allegation of foreign residence, and concluding that there were "reasonable grounds to believe * * * that Mr. Carroll was not a bona-fide resident of a foreign country or countries during the years in question * * *."[3] Even if it is assumed, *arguendo*, that the taxpayer's proof of foreign residence required contravention, the affidavit submitted on behalf of the Government, alleging that there were reasonable grounds to believe that the taxpayer was not a bona fide foreign resident within the meaning of the exemption provisions, was sufficient to demonstrate "reasonable grounds for a suspicion" that the alleged defense was without substance. *Corbin Deposit Bank* v. *United States*, 244 F. 2d 177 (C. A. 6th).[4] To require greater specificity—or as the taxpayer contends, the very litigation of the issue—"would virtually nullify the investigative powers

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[3] See Paragraphs 6 and 8 of the affidavit of Bernard V. Roberts. (R. 87a-88a).

[4] See also *Globe Construction Co.* v. *Humphrey*, 229 F. 2d 148 (C. A. 5th); *United States* v. *United Distillers Products Corp.*, 156 F. 2d 872, 874 (C. A. 2d); *Application of Levine*, 149 F. Supp. 642 (S.D. N.Y.), affirmed *per curiam*, 243 F. 2d 175 (C. A. 2d); *Zimmermann* v. *Wilson*, 105 F. 2d 583, 586 (C. A. 3d).

enumerated in §§ 7601 through 7607 of the Internal Revenue Code of 1954." (*Id.* at p. 178.) See also *Globe Construction Co.* v. *Humphrey*, 229 F. 2d 148 (C. A. 5th); *Peoples Deposit Bank & Trust Co.* v. *United States*, 212 F. 2d 86 (C. A. 6th).

2. There is no conflict of decisions. The alleged conflict with decisions of the Third and Ninth Circuits (Pet. 12) is admittedly based on the taxpayer's hypothesis (Pet. 13) that the instant case "conflicts with the settled rule that a showing of the reasonableness and necessity for the examination must be made by the Government." But such a showing was made here; as indicated above, the information and documentary material sought to be obtained through the summons proceeding were alleged by the Government, and were considered by both courts below, to be relevant not only to a determination of admittedly unreported income but also to a determination of the foreign residence issue. In fact, the District Court concluded that (Pet. 22)—

> Without more, it is apparent from the face of the complaint that the information sought is relevant to the inquiry concerning persons who may be liable to pay an internal revenue tax, or that it bears upon matters required to be included in a return, and by the very nature of the information required it does not appear to be unnecessary.

Clearly, the investigation was not "out of proportion to the end sought," and no constitutional violation was involved in enforcing the summons. *Zimmermann* v. *Wilson*, 105 F. 2d 583, 585 (C. A. 3d).

In any event, the cases alleged to be in conflict with the instant case (Pet. 12) do not support the taxpayer's position. In *Local 174, Etc.* v. *United States*, 240 F. 2d 387 (C. A. 9th), the court found that, in connection with the investigation of the tax liability of a union official and his wife, the subpoena in question (p. 391) "asked for a general search of the papers and documents of the Local" and that there had been "obviously no attempt to confine the demand to items which might be relevant or material to the taxes of the Brewsters." The factual situation in the instant case is quite different; the summons called for the *taxpayer's* records, which were so described therein as to make it patent that they were germane to an investigation of his liability. *Boren* v. *Tucker*, 239 F. 2d 767 (C.A. 9th), upon analysis, supports the decision below. In affirming a contempt judgment for refusing to produce corporate books and records sought to be examined in connection with an investigation of the liability of two of its officers, the court—observing that (p. 773) "Any issue of proof of actual fraud must of necessity await trial; and may never ultimately be alleged"—concluded that the special agent had made (p. 774) "a sufficient showing of the possibility of fraud to permit the enquiry into the matter * * *." In *Martin* v. *Chandis Securities Co.*, 128 F. 2d 731 (C. A. 9th), also involving a proposed examination of third party records, the court found that the Government's petition to enforce the summons, where the statute of limitations had run against assessment, had (p. 733) "stated no reason for examination of the requested records," and

that it had not been (p. 735) "stated anywhere specifically that * * * [the Government's] representatives had a 'reasonable ground' to entertain * * * suspicion" of fraud. The court explicitly accepted as the appropriate test that (p. 735) "the only showing required (and we assume also that the only allegation required) is a 'showing of probable cause, sometimes called reasonable ground for suspicion of fraud.'" Finally, *Zimmermann* v. *Wilson*, 105 F. 2d 583 (C. A. 3d), is also in accord with the decision below. In holding that the Government was entitled to examine certain third party records after the running of the statute of limitations on assessment against the taxpayer, the Third Circuit approved the proposition that (p. 586) "actual proof of fraud was not necessary, but that a showing of reasonable ground of 'suspicion of fraud' was enough"; that it was (p. 585) "not unreasonable to allow the Government to obtain all available information"; and that the "question of whether fraud is established * * * is not before us * * * [since the investigating authorities are] merely seeking further information."

As for the two decisions of this Court with which the taxpayer generally asserts conflict[5] (Pet. 8), they do not involve statutory provisions, questions, or facts similar to those here involved. Indeed, insofar as they may be deemed relevant, they support the decision below.

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[5] *Hale* v. *Henkel*, 201 U.S. 43; *Federal Trade Commission* v. *American Tobacco Company*, 264 U.S. 298.

CONCLUSION

The decision of the court below is correct, there are no conflicting decisions, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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